

**DRONE WARS: THE CONSTITUTIONAL
AND COUNTERTERRORISM IMPLICATIONS
OF TARGETED KILLING**

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS AND HUMAN RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED THIRTEENTH CONGRESS

FIRST SESSION

APRIL 23, 2013

Serial No. J-113-16

Printed for the use of the Committee on the Judiciary



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DRONE WARS: THE CONSTITUTIONAL AND COUNTERTERRORISM IMPLICATIONS OF TARGETED KILLING

TUESDAY, APRIL 23, 2013

UNITED STATES SENATE
SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS
AND HUMAN RIGHTS
COMMITTEE ON THE JUDICIARY
Washington, DC.

The Subcommittee met, pursuant to notice, at 4 p.m., in Room SH-216, Hart Senate Office Building, Hon. Dick Durbin, Chairman of the Subcommittee, presiding.

Present: Senators Franken, Blumenthal, Grassley, Graham, Lee and Cruz.

OPENING STATEMENT OF HON. DICK DURBIN, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Chairman DURBIN. This hearing of the Subcommittee on the Constitution, Civil Rights and Human Rights will come to order.

Today's hearing is entitled, "Drone Wars: The Constitutional and Counterterrorism Implications of Targeted Killing." Senator Cruz is on his way from another hearing, so I wanted to start on time, but certainly understand there are just conflicting schedules that we face here.

This is the first ever public hearing in the Senate to address the use of drones in targeted killing. We are pleased to have such a large audience for today's hearing. It demonstrates the importance and timeliness of this issue. Thank you to those that are here in person, those watching live on C-SPAN, and those following the hearing on Twitter and Facebook using the hashtag *dronewars*.

At the outset I want to note that the rules of the Senate prohibit outbursts, clapping, or demonstrations of any kind. Please be mindful of those rules as we conduct this hearing.

There was so much interest in today's hearing, we also have another larger room to accommodate any overflow crowd. If anyone could not get a seat in the hearing room, they can go to Room 226 in Dirksen.

At the outset, I want to thank Senators Leahy and Grassley, Chairman and Ranking Member of the Senate Judiciary Committee, for pressing the Justice Department to provide the Committee with the Justice Department's memos on targeted killing of Americans.

The Department recently provided these memos to the Committee. I have had a personal opportunity to review them in advance of today's hearing. As we will discuss today, this was a positive step, but I still believe the Justice Department should provide the Committee with its memos on the targeted killing of non-Americans as well and make public the legal analysis contained in those memos without revealing any intelligence sources or methods.

I would like to take a moment to also acknowledge my colleague and friend, Congresswoman Barbara Lee of California who has joined us today. We spoke recently on the phone about drones and I am aware of her great interest in this issue. Thank you, Congresswoman Lee, for being here.

I also asked unanimous consent to include in the record a statement from Senator Rand Paul of Kentucky. During the filibuster of John Brennan's nomination on the Senate floor, I invited Senator Paul to testify at today's hearing. He could not make it because of a conflict, but he has submitted a written statement and without objection, it will be added to the record.

[The prepared statement of Senator Paul appears as a submission for the record.]

Chairman DURBIN. I will begin by providing some opening remarks and then turn to Senator Cruz, thank you for joining us, for his opening statement before our witnesses.

The Constitution bestows upon the President of the United States the unique responsibility and title of Commander in Chief. With that title comes the responsibility to protect and defend America from foreign and domestic enemies. To accomplish this goal, the President has a military that is the best in the world. Best trained, best equipped, and most effective.

While the tactics and tools used by our military are ever-evolving, one thing must remain constant. Ours is a democratic society where the rule of law prevails. The President must exercise his authority as Commander in Chief within the framework established by the Constitution and the laws passed by Congress. Even as President Obama commands a military with the most sophisticated weapons known to man, including weaponized drones and targeted killing operations, his authority is grounded in words written more than 200 years ago in our Constitution.

At times over the course of our history, the rule of law has been abused during times of war. When this occurs, it challenges America's moral authority and standing in the world. This potential for abuse is a stark reminder of Congress' responsibility to authorize the use of force only in narrow circumstances and to conduct vigorous oversight once authorized.

The heat of battle and the instinct to defend can create moral, legal and constitutional challenges. We can all recall the controversy surrounding the use of torture in a previous administration. Torture, though clearly illegal under both domestic and international law, was rationalized at that time by some as appropriate in our war against terrorism.

Today's subject, the targeted killing of combatants, in contrast to torture, has always been part of warfare in areas of active hostility. In recent years, however, it has been employed more frequently away from the traditional battlefield. The use of drones has in

stark terms made targeted killing more efficient and less costly in terms of American blood and treasure.

There are, however, long-term consequences, especially when these air strikes kill innocent civilians. That is why many in the national security community are concerned that we may undermine our counterterrorism efforts if we do not carefully measure the benefits and costs of targeted killing.

This administration has not claimed the authority to override laws like the criminal prohibition on torture. Instead, the administration has attempted to ground its use of drones in a statute, the 2001 Congressional Authorization to Use Military Force. Officials like Attorney General Eric Holder and CIA Director John Brennan have acknowledged the strikes and delivered speeches explaining the administration's legal and policy positions.

In my view, more transparency is needed to maintain the support of the American people and our international community. For example, the administration should provide more information about its analysis of its legal authority to engage in targeted killing and the internal checks and balances involved in U.S. drone strikes.

The administration must work with Congress to address a number of serious, challenging questions, some of which are being hotly debated even as we meet. What is the constitutional and statutory justification for targeted killing? What due process protections extend to an American citizen overseas before he is targeted and killed by a drone strike? What are the legal limits on the battlefield in the conflict with Al-Qaeda? Is it legal to use drones not just in war zones like Afghanistan, but also to target terrorist suspects in places where the U.S. is not involved in active combat such as Somalia and Yemen?

What is the legal definition of a combatant in the conflict with Al-Qaeda and who qualifies as associated forces under the 2001 AUMF? Should the U.S. lead an effort to create an international legal regime governing the use of drones? What moral and legal responsibility does the United States have to acknowledge its role in targeted killing and make amends for inadvertent destruction and loss of life, particularly where missiles kill or injure innocent people?

These are some of the questions that will be explored at this very serious hearing. Speaking recently about the use of drones, President Obama said, "One of the things we have 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 reigned in, but any President is reigned in."

Now, I agree with the President on the need for a clear, legitimate, and transparent legal framework for targeted killing. Today is the first step in that process. I do want to note for the record my disappointment that the administration declined to provide a witness to testify at today's hearings. I hope that in future hearings we will have an opportunity to work with the administration more closely. I will now recognize my colleague, Senator Cruz, the Ranking Member of this Subcommittee.

**OPENING STATEMENT OF HON. TED CRUZ,
A U.S. SENATOR FROM THE STATE OF TEXAS**

Senator CRUZ. Thank you, Mr. Chairman. I would like to begin by thanking the Chairman for holding this hearing on this very important topic. I would like to thank each of the witnesses for joining us today, and I would like to echo the concern that the Chairman raised and the disappointment that the Obama administration declined to send a witness, particularly after this hearing was delayed for 1 week in order to accommodate the administration's schedule. I am hopeful that they will provide witnesses at subsequent hearings.

Drones are a technology. Like any technology, they can be used for good purposes or for ill. The real scope I believe of this hearing, and of the concern, is on the scope of Federal power, and in particular the scope of Federal power to engage in targeted killings.

The Obama administration has for some time advocated for a drastic expansion of Federal power in many, many contexts. Indeed, on April 9th, I released a report that detailed six different instances in which the Obama administration has gone before the U.S. Supreme Court advocating a radically broad view of Federal power and six different times the U.S. Supreme Court has unanimously rejected the administration's view of Federal power and has instead concluded unanimously that Federal power is more circumscribed than this administration recognizes.

Indeed, Federal overreach is what was at the heart of the March 6th filibuster led by Senator Rand Paul which I was quite proud to participate in a significant manner. That day began with a hearing before this full Committee where Attorney General Holder testified. At the time, I took the opportunity to ask Attorney General Holder if he believed the Constitution allowed the U.S. Government to use a drone to kill a U.S. citizen on U.S. soil if that individual did not pose an imminent threat.

The Attorney General declined to answer my question as initially posed and instead he responded that he did not believe it would be appropriate to use a drone to do so. He said, and I paraphrase here, that we should rest confident that in their discretion, the administration would not choose to do so.

My response of course was that the question was not a question about propriety. It was a question addressed to the chief legal officer of the United States asking whether the United States Department of Justice had a legal position on whether the Constitution allows the Federal Government to kill a U.S. citizen on U.S. soil if that individual does not pose an imminent threat.

Three times I posed that question to General Holder, three times he declined to answer and simply stated it would be appropriate, but he would not say whether or not it would be constitutional.

Finally after the third time, he went back and said that when he said inappropriate, what he meant was unconstitutional. That exchange served later as the predicate for the 13-hour filibuster that occurred as first Senator Rand Paul and then one Senator after another after another came to the floor of the Senate to insist on basic constitutional limits on the authority of the Federal Government.

Let me be clear. The authority of the Federal Government and the protection of the Constitution should not be a partisan matter. The statement from the Attorney General that we should trust the Federal Government to do what is appropriate, in my view the Bill of Rights is predicated on the notion that we do not trust those in power, be they Democrats or Republicans, that the Bill of Rights exists to protect our liberties regardless of who happens to be in power.

That 13-hour filibuster did something remarkable. During the course of it, Americans became fixated by C-SPAN. Now, I would suggest fixated by C-SPAN is not a phrase that exists ordinarily in the English language. But we saw thousands upon thousands of Americans go on Twitter, go on Facebook, begin speaking out for liberty, for limiting the authority of the Federal Government to take the life of U.S. citizens on U.S. soil.

As a consequence of standing for principle, we saw the next day the administration do what it had declined to do for many weeks, which is acknowledge in writing that the Constitution does not allow a U.S. citizen to be killed in those circumstances. In my view, we need greater protections than simply a letter from the administration and I am hopeful that Congress will pass legislation making very clear the limits on Federal power and I hope that this panel of witnesses will share your wisdom and expertise on the appropriate boundaries under the Constitution and the appropriate statutory boundaries that Congress should consider. Thank you.

Chairman DURBIN. Thank you, Senator Cruz. We are going to turn to our panel of witnesses. At the outset I want to thank Senator Cruz and his staff for working with me and my staff to develop a witness list for today's hearing. You will hear a wide range of different points of view in the course of the testimony.

Now in keeping with the practice of the Committee, will the witnesses please rise and raise their right hands to be sworn? Do you swear or affirm the testimony you are about to give before the Subcommittee will be the truth, the whole truth and nothing but the truth so help you God? Thank you.

Let the record reflect that the witnesses, all six, have answered in the affirmative.

The first witness will be retired General James Cartwright. General Cartwright currently serves as the Harold Brown Chair in Defense Policy Studies at the Center for Strategic and International Studies. General Cartwright retired from active duty on September 1st, 2011, after a 40-year career in the U.S. Marine Corps.

Among many other positions, he served under two Presidents as Vice Chairman of the Joint Chiefs of Staff, the Nation's second highest military officer. He was also Commander of the U.S. Strategic Command. General Cartwright studied at the University of Iowa, the Air Command and Staff College, the Naval War College, and the Massachusetts Institute of Technology, and I note with pride he is a native of Rockford, Illinois.

General Cartwright, thank you for your service to our country and thank you for joining us today. Your written statement will be entered into the record and now your opportunity to testify, please.

**STATEMENT OF GENERAL JAMES CARTWRIGHT,
U.S. MARINE CORPS, RETIRED, WASHINGTON, DC**

General CARTWRIGHT. Thank you, Senator Durbin and Senator Cruz and other distinguished Members. It is an honor and a pleasure to testify before this Committee. Thank you for inviting me.

In the time allotted, I would like to address three questions central to the topic of this hearing. The first, Are we to continue with policies of the global war on terror as they relate to targeted killings and the use of armed, remotely piloted aircraft? That is, number one, defeat terrorists and demolish their organizations.

Number two, identify, locate, and demolish terrorists along with their organizations. Three, deny sponsorship, support, and sanctuary to terrorists. Four, diminish the underlying conditions that terrorists seek to exploit. Fifth, defend U.S. citizens and interests at home and abroad under both the domestic and international law regarding national self defense. I support this mission and policy.

Second, under what authority and accountability framework, when operating outside the United States, are we to operate? Intelligence, often referred to as Title 50 in covert activities, military, often referred to as Title 10 in clandestine activities, law enforcement, usually on the outside by the FBI, or some other framework.

Is the framework robust enough in this mission area to provide appropriate direction, oversight, and accountability? The DOD framework requires written orders from the National Command Authority, Secretary of Defense, and the President to each person in the chain of operation and accountability. Who, what, when, where, what capabilities, what restraints and what types of collateral damage, what to do if there is collateral damage, required metrics and after action reports, et cetera.

This direction is provided in the mission statement and objectives, warning orders to begin detailed planning, preparation to deploy orders to move to a point of embarkation, deployment orders to move to the objective and execute orders to conduct the operation.

I could support consolidation of the armed, remotely piloted aircraft under DOD, a question that was asked of me, only if there are fundamental changes in how DOD trains and equips for this mission. I believe each of the authority and the accountability constructs, intel, military, and Justice, should remain available to the President, adjusted to ensure that they are effective for this particular mission.

Last, under what conditions are armed, remotely piloted aircraft an appropriate capability to carry out this mission? In this campaign, the U.S. has employed bombers, attack aircraft, cruise missiles, and special operation forces in various scenarios. Improvements in technology and emergence of armed, remotely piloted aircraft have provided a significant improvement in our ability to find, fix, and target in this mission area. They are not perfect, they can be improved.

No other capability we have today is better suited though to conduct this mission under the guidelines provided. Improvements in sensors and weapons that increase better identification of authorized targets and weapons that reduce the potential for collateral damage should be pursued.

Finally, and in summary, my recommendations to the Committee. One, review and address as appropriate the framework for direction, oversight, and accountability, and I have a long piece on this inside of my written testimony.

If it is to be a covert mission, it should be conducted by the intelligence community. If it is to be a clandestine mission, it should be conducted by the military and the train and equip authorities will need to be adjusted. Improve the remotely piloted aircraft and weapon systems used in this mission area to better align their capabilities for the desired effect.

I am concerned we may have ceded some of our moral high ground in this endeavor. While I continue to support the objectives of this campaign, I commend to the Committee for its consideration the recommendations in my written and oral statements. Thank you, Mr. Chairman.

[The prepared statement of General Cartwright appears as a submission for the record.]

Chairman DURBIN. Thank you very much, General Cartwright.

Our next witness is Professor Rosa Brooks of Georgetown University Law Center.

In addition to teaching law, Professor Brooks is a Senior Fellow at the New America Foundation and a weekly columnist on national security issues for Foreign Policy Magazine. Previously Professor Brooks served as counselor to the Under Secretary of Defense for Policy where she founded the Defense Department's Office for Rule of Law and International Humanitarian Policy.

She is a graduate of Harvard University, Oxford University, where she was a Marshall Scholar, and Yale Law School.

Professor Brooks, the floor is yours.

**STATEMENT OF ROSA BROOKS, PROFESSOR OF LAW,
GEORGETOWN UNIVERSITY LAW CENTER, WASHINGTON, DC**

Professor BROOKS. Thank you, Senator. I submitted 20 pages of written testimony, but much like C-SPAN, people do not usually refer to what law professors write as riveting. So I am going to condense that 20 pages into 5 minutes here and focus almost exclusively on the broader rule of law issues that I believe are raised not by drones as such, but by U.S. targeted killing policy.

In the context of the traditional battlefield, drones do not present any new legal or rule of law issues. It is in the context of places such as Somalia, Yemen, et cetera, outside of traditional so-called hot battlefields that we were suddenly presented with significant problems, to the point in which the use of U.S. targeted killing policy as currently understood appears to both challenge the legal frameworks that exist and potentially dangerously undermine the rule of law. This is not because of some conspiracy or lack of concern, but because we are faced with a situation where the fit between the law and the legal frameworks we have and the situation on the ground is not very good anymore.

The idea of the rule of law, as you and Senator Cruz both said, is to protect people from the arbitrary exercise of government power. In ordinary circumstances we all know that that means the government cannot come and take your property or your liberty or kill you without some sort of due process. Similarly, we believe that

the government cannot use force to kill someone in the borders of another state without that state's consent and without appropriate judicial process.

Obviously there are situations where ordinary rules do not apply, such as in wars. In the context of wars or armed conflicts, the law of armed conflict tells us that it is acceptable to kill, whether by slingshot, gun, or drone.

The problem here is that we have two different bodies of law which have radically different rules concerning due process and the use of force by the state. In the law we call this the *lex specialis* and the *lex generalis*. *Lex specialis* is a fancy Latin term that refers to special law applying only in special circumstances, in this case armed conflicts, law of armed conflict. *Lex generalis* is the general law that applies in general circumstances, ordinary peace time.

It is not necessarily a problem to have two radically different sets of rules that apply in different situations. It is not necessarily a problem as long as we are pretty clear on how we know the difference between when one set of rules applies and when the other set of rules applies.

On the traditional battlefield, it is pretty clear. You have uniformed soldiers, you have open acknowledgment of the armed conflict, you can have objective observers such as journalists saying yes, it looks like there is a large scale armed conflict here.

On the other hand, once we get off that traditional battlefield, when we are looking at an inchoate protean enemy such as geographically disbursed globalized terrorist organizations, it becomes very, very hard to say, "here is where the armed conflict is, here is where the armed conflict is not; here is who is a combatant, here is who is not a combatant." All of those legal frameworks just start breaking down.

The problem that we now have is that nobody outside a very small group within the U.S. executive branch knows how we are making those decisions about who is a combatant, where is the war, et cetera. It is not like World War II. Also, the information and the process are classified, so it is just very, very hard to get a grip on what the basis is for making any decisions.

That means that all of our core rule of law questions in which we figure out how we even know what body of law applies are unanswered. What is the criteria for determining who is a combatant or who is an affiliate of Al-Qaeda? What does that mean? Where is the war? Does law of armed conflict travel anywhere a combatant travels, making it applicable anywhere? What about sovereignty issues? Does it matter if the state does not consent? Who decides if a state is unwilling or unable to take appropriate action?

Who in the U.S. executive branch makes the decisions? What is the chain of command? What are the mechanisms for ensuring that we prevent abuses?

This is a deep problem, as I said. I do not think this is a problem of lack of good faith on the part of officials. This is just a problem when we have a concept like armed conflict: If it gets squishy enough that we can use that same term to talk about World War II and what is going on right now with regard to Al-Qaeda and its

affiliate, frankly that is a term that is not doing a lot of useful work anymore.

What it means in practice is that we just lose any principle means of categorizing a targeted killing. Should we call them lawful targeting of combatants? Lawful under the law of war? No problem, if that is the case. Or should we call them murder, extra-judicial killings, as many human rights groups have asserted? We do not have a principle basis for deciding anymore.

I also worry very much about the precedent we are setting for other less scrupulous states such as Russia, China, et cetera. I can talk about all of this in much more detail and would be happy to during the question period. I think what it comes down to, Senator Durbin and Senator Cruz, is that right now we have the executive branch making a claim that it has the right to kill anyone anywhere on earth at any time for secret reasons based on secret evidence in a secret process undertaken by unidentified officials.

That frightens me. I do not doubt their good faith, but that is not the rule of law as we know it. In my statement submitted for the record, I do suggest a number of reforms that might improve our ability to ensure oversight and accountability. I do not have time to discuss them now, but I very much hope that we will address those issues later.

I will just leave you with this final thought, which is that I believe that it is absolutely possible to make a plausible, legal argument justifying each and every U.S. drone strike. But to me, this just suggests that we are working with a set of legal concepts that have outlived their usefulness.

If law exists to restrain untrammelled power, then the real question for us is not whether U.S. targeted killings are all legal, the real question is this: Do we want to live in a world in which the U.S. Government's justification for killing is so infinitely malleable?

Thank you very much.

[The prepared statement of Professor Brooks appears as a submission for the record.]

Chairman DURBIN. Thank you, Professor Brooks.

Professor Ilya Somin, did I pronounce that correctly? Somin, is at the George Mason Law School. Make sure your microphone is on, you will see a red light if it is.

Professor Somin's research focuses on constitutional law, property law, and popular political participation. He is co-editor of the Supreme Court Economic Review. Previously, he served as the John Olin Fellow in Law at the Northwestern University Law School. He earned a B.A. at Amherst College, an M.A. in Political Science from Harvard, and a J.D. from Yale Law School.

Please proceed with your testimony.

STATEMENT OF ILYA SOMIN, PROFESSOR OF LAW, GEORGE MASON UNIVERSITY SCHOOL OF LAW, ARLINGTON, VIRGINIA

Professor SOMIN. I would like to start by thanking Chairman Durbin and Senator Cruz and the other Members of the Committee for your interest in this important issue. In my testimony I would like to focus on two key points.

First, that the use of drones for targeted killing in the war on terror is not in and of itself illegal or immoral. But second, that there are serious legal and policy issues that arise from the problem of ensuring that we are actually choosing the right targets and confining these drone strikes to people who really are terrorist leaders or at least terrorists of some kind as opposed to innocent people unduly caught in the crossfire.

By its very nature, in a war, targeted killing in my view is a legitimate tactic and the current conflict between the United States and Al-Qaeda and its affiliates is a war authorized by the Authorization for the Use of Military Force enacted in 2001. At various times, the President, Congress, and the Supreme Court have all recognized that the current conflict qualifies as a war. Certainly in many past wars, combatants have legitimately resorted to targeted killing. For example, during World War II, the United States targeted Japanese Admiral Yamamoto and virtually everybody agrees that that was an entirely legitimate military operation.

If it is legal and morally permissible to use targeted killing against uniformed military officers, surely the same applies to terrorists and terrorist leaders. It would be perverse if terrorists obtained greater immunity from targeting than that enjoyed by uniformed military officers who at least pretend to obey the laws of war whereas the terrorists clearly do not.

In addition, I think it is not inherently illegal or problematic to target American citizens in such situations so long as those American citizens are also combatants in the relevant war. The Supreme Court in the 2004 *Hamdi* decision and at other times has recognized that sometimes U.S. citizens do qualify as enemy combatants.

Although the use of targeted killing, whether by drones or with other weapons is not inherently illegal or unethical, the problem of choosing targets does raise some very serious issues. In the war on terror, we face an adversary that generally does not wear uniforms and also often does not have a clear command structure. Therefore it is often difficult to tell who is a legitimate target and who is not. This state of affairs raises two possible problems.

First, sometimes we might inadvertently or recklessly target an innocent person. Second and worse, the possibility exists that the government could deliberately target someone who is innocent because perhaps they are a critic of the government or they otherwise attract the ire of leading government officials.

This is particularly problematic from a constitutional point of view if there is abusive targeting of an American citizen. Doing that would violate the due process clause of the Fifth Amendment which prevents the government from depriving people of life, liberty or property without due process of law.

Two aspects of current policy raise serious questions about whether we are doing enough to ensure that we are choosing only legitimate targets. One is the sheer number of targeted killings over the last several years, which includes hundreds or even thousands of people. Studies by various people including Mr. Bergen, who will testify later, suggest that only a small percentage of those individuals who are killed actually were senior Al-Qaeda leaders.

Second, the Department of Justice memo released a couple of months ago states that it is permissible to target American citizens

who are senior operational leaders of Al-Qaeda and who pose an imminent threat, but it does not say anything about how much evidence we need to have before we can determine that someone really is a senior Al-Qaeda leader or even which officials get to make that decision.

In my written testimony, I discuss in more detail some possible institutional solutions to these problems. One that I think deserves serious consideration is the establishment of an independent court to review potential targeted killing objectives and to ensure that they are backed by sufficient evidence. It could perhaps be similar to the court currently used to authorize surveillance and wiretapping within the United States.

Whatever solution we opt for, it is probably not possible to have a perfect system that avoids all mistakes. What we should aim for is a system that on the one hand permits legitimate military operations to go forward, but also provides a check on what might otherwise be the uncontrolled and arbitrary power of the executive to order killings, particularly those targeted at U.S. citizens.

I thank the Subcommittee and I very much look forward to your questions.

Thank you very much.

[The prepared statement of Professor Somin appears as a submission for the record.]

Chairman DURBIN. Thank you, Professor.

We will now hear from Colonel Martha McSally. She served as an officer in the U.S. Air Force for 22 years. She was the first woman in U.S. history to fly a fighter jet and command a fighter squadron in combat. She earned a bronze star among many other honors.

Colonel McSally served as the Chief of Current Operations in Africa where she helped build Africom's targeting team. She was assigned to the Saudi Arabia Air Operations Center when the predator drone was first used for reconnaissance and air strikes.

Colonel McSally also served as a Legislative Fellow with our former colleague, Senator John Kyl. Colonel McSally holds degrees from the Air Force Academy, the Kennedy School of Government at Harvard, and the Air War College. She was added to the panel at the request of our friend and colleague, Senator Lindsey Graham.

Colonel McSally, thank you for serving our country and the floor is yours.

**STATEMENT OF COLONEL MARTHA McSALLY,
U.S. AIR FORCE, RETIRED, TUCSON, ARIZONA**

Colonel McSALLY. Thank you, Mr. Chairman, Ranking Member Cruz, and the distinguished Members of the Subcommittee.

I come to you today from an operational point of view and I will speak in generalities at the unclassified level from my military experience related to the use of remotely piloted aircraft for targeted killings.

I use the term remotely piloted aircraft, which is my first point, instead of drones because I think that is actually part of the challenge. There is an information operations campaign by Al-Qaeda going on against us and the word drone actually has a connotation

that we have got these autonomous vehicles flying around and striking at will without a whole lot of scrutiny and oversight to them.

The military does use the term remotely piloted aircraft to explain and to try and paint the picture that it actually takes about 200 individuals to keep one of these aircraft airborne for a 24-hour orbit. Those 200 individuals include the operators, the intelligence personnel, the maintenance personnel, the equipment people, the lawyers are also part of the process. You have literally hundreds of other personnel that are involved in the process on the military side when you are actually conducting one of these operations. So I will be using the term RPA throughout my testimony, and that certainly is one of the points to make.

In my written testimony, I explain that I think this issue is very important and there are very legitimate questions that need to be asked for the oversight roles that we have, as when we are choosing if it is legal to use lethal force for targeted killings and if it is a good counterterrorism strategy to use that force.

Those questions are legitimate and need to be asked and that oversight has got to be tightened up. There has been way too much, I think, vagueness and lack of clarity, even in the information that has come out of the chain of command related to their legal argument and their strategy on that matter.

I believe it should be separated though into three questions. Is it legal? Is it good strategy? Then the third question is if we have decided that we want to use lethal force, because it is legal and good strategy in the counterterrorism arena, then what platform should we use?

So I will be focusing on discussing that platform and then the process that we go through. It would be surprising to you, perhaps, that a pilot would be advocating for the use of remotely piloted aircraft in order to conduct operations. But in the course of my 22 years in the military, I have extensively worked with remotely piloted aircraft for a variety of different means, and when we are on the regular battlefield, you often have a Lieutenant Pilot and an Airman First Class on the ground making decisions to use lethal force with potential strategic consequences.

If they hit the wrong target and there is collateral damage, then there is a great level of potential issues related to that wrong decision.

When you are talking about the use of remotely piloted aircraft, you have what I believe is unprecedented level of persistence, oversight, and precision if you are choosing to use that as a platform. Your other choices are fighter aircraft, cruise missiles, SEALs, artillery, and other means of using lethal force. But when you are using remotely piloted aircraft, oftentimes because the number of issues that have to come together and line up to include positive identification, geographic location, collateral damage assessment, friendly force deconfliction, and other communications that need to happen, it is often not practical because the targets are fleeing to use any of these other assets.

As an example, you would not want to have to wait and then launch fighters from a certain base, air refueling tankers, diplomatic clearances, all while these stars are all lining up in a very

fleeting moment that could basically those conditions could not be met in the next moment. So if you have a remotely piloted aircraft overhead, as those conditions are lining up, the process actually has a great deal of extraordinary scrutiny.

You have the chain of command watching, you have the intelligent analysts watching, you actually have the lawyers sitting side by side with you and you can wait until the moment that you have identified the positive identification and all the criteria has been met and you can also abort at the last minute. If you launch a cruise missile for a lethal strike, there is usually 30 minutes of planning, 30 minutes time of flight and then oftentimes you cannot divert that missile as an example.

So a remotely piloted aircraft actually gives us the highest level of scrutiny and oversight and persistence and precision if you are deciding to have a lethal strike. I look forward to the questions and the discussion on this matter and also at the unclassified level the process that we go through in the military to achieve the different criteria before we are actually cleared for those strikes.

[The prepared statement of Colonel McSally appears as a submission for the record.]

Chairman DURBIN. Thank you, Colonel McSally.

Our next witness is Peter Bergen. Mr. Bergen is Director of the National Security Studies Program with the New America Foundation. He is a best-selling author and widely publicized journalist.

Mr. Bergen is CNN's National Security Analyst and a Fellow at Fordham University Center on National Security. He has worked as an adjunct lecturer at Harvard's Kennedy School of Government and as an adjunct professor at the Johns Hopkins University School of Advanced International Studies. He holds an M.A. from New College at Oxford University.

Mr. Bergen, please proceed.

STATEMENT OF PETER BERGEN, DIRECTOR, NATIONAL SECURITY STUDIES PROGRAM, NEW AMERICA FOUNDATION, WASHINGTON, DC

Mr. BERGEN. Thank you, Mr. Chairman and Senator Cruz and the other Members of the Committee for the privilege of testifying.

We at the New America Foundation basically are collecting data on CIA drone strikes for the past 3 or 4 years. I am not a lawyer, so my presentation will really be about what has been happening in the drone program.

Here are some of the main points. Under President Obama, there has been 307 drone strikes in Pakistan. That is six times more than President Bush did in his two terms in office. The total number of deaths in Pakistan we calculate somewhere between 2,000 to 3,300 roughly.

The drone program in Pakistan has changed. In 2010 there were 122 drone strikes, over time it has decreased. That is for a series of reasons. There has been a significant pushback from the State Department about, are we losing the wider war in Pakistan in a sense? If the price of a successful drone program is angering 180 million Pakistanis, one of the largest countries in the world, a country with nuclear weapons, that is quite a large price to pay.

I think that there has been a more discriminating program in Pakistan as a result of this discussion. The CIA still has the ability to more or less override State Department objections, but I think the larger discussion has been won by the State Department. Also there is an increasing Congressional oversight, there is more public discussion as there is in this forum. Supreme Court Justice Brandeis a long time ago said sunlight is the best disinfectant and I am really thankful that we are having this public discussion.

There are a whole series of reasons the CIA drone base in Balochistan was closed. There are probably fewer targets in the tribal regions to actually kill, and so you have seen a decline in Pakistan. At the same time, and we will hear from the witness to my left in a minute about the drone program in Yemen.

There was only one drone strike in Yemen under President George W. Bush, there were 46 last year under President Obama. We calculate there were somewhere between 467 and 674 casualties. All but six of those took place under President Obama.

Who are the targets? As Professor Somin indicated, militant leaders are not really being killed in any great number. We calculate that only 2 percent of the total number of casualties are actually people you could really term leaders.

That is an interesting development. What was initially started, I think, as a program that would target high level members of Al-Qaeda has in a sense devolved, particularly in Pakistan, into a kind of counterinsurgency air force and you can say that is a good thing or a bad thing, but it is a fact that that is happening.

Where are the targets in Pakistan? They are overwhelmingly in North Waziristan for obvious reasons, that is where Al-Qaeda and the Haqqani Network are basically located.

What of the civilian casualty rate? We have found that it has declined very significantly over time. Initially in 2006, it was almost 100 percent. Now today confirmed civilian casualties we calculate about 2 percent. We also added an unknown category of 9 percent because sometimes it is not clear if somebody is a civilian or a militant. After all, everybody dresses the same, and somebody that is referred to in a press account as a tribesman could be either a Taliban or a civilian.

We are finding a very significant decrease in the number of civilian casualties. There are all sorts of reasons for that. I think one is drones are persistent, as Colonel McSally pointed out. There are smaller payloads, there is better intelligence. President Obama is taking a more direct role in adjudicating potential strikes where there might be a civilian casualty. So we have seen a very strong drop, but there are still civilian casualties.

We are not the only group that looks at this issue. There is the Long War Journal and London-based Bureau for Investigative Journalism, but we are all finding roughly the same thing, that the civilian casualty rate in 2012 is quite low.

Ben Emmerson, who is a United Nations Special Rapporteur on this issue, went to Pakistan recently and had a very interesting discussion with Pakistani lawmakers and officials. They said to him that there were 400 civilian casualties in Pakistan, which is pretty close to the number that we actually think is correct, and this is the first sort of official acknowledgment in Pakistan, at least

on background that the civilian casualty rate is much lower than is presented in the Pakistani press.

What impact is this having on Al-Qaeda and the Taliban? The best witness for the impact on Al-Qaeda is Osama Bin Laden himself. In the documents recovered in Abbottabad, he was very concerned about the drone program. With the amount of damage it was inflicting on his group, he was suggesting that Al-Qaeda should decamp to Kunar in Eastern Afghanistan which is heavily forested and mountainous and it would be hard for American drones to see what is going on.

He even suggested his son should move to Qatar, the richest and one of the safest countries in the world, away from the tribal regions. So we are seeing that it is having an impact and just to reinforce what Rosa Brooks said, the precedents we are setting clearly are worrisome, potentially.

Eighty countries have drones, three of them have armed drones that we know of. The Chinese are very close to being able to arm their drones. You could easily imagine a situation where China deploys drones against Uighur separatists, for instance, using essentially the same rationale that we have used against Al-Qaeda or the Taliban who we deem to be terrorists.

[The prepared statement of Mr. Bergen appears as a submission for the record.]

Chairman DURBIN. Thank you very much, Mr. Bergen.

Our last witness on the panel has certainly made a personal sacrifice to be with us. Farea Al-Muslimi is a Yemeni youth activist, writer, and freelance journalist. He has co-founded and chaired several local youth initiatives in Yemen. He currently works for Resonate! Yemen, a grassroots, youth-run foundation aimed at constructively engaging Yemeni youth in public policy dialogue.

With the assistance of a U.S. State Department scholarship, Farea studied in the U.S. during high school. He attended the American University of Beirut and graduated with a degree in Public Policy from that institution last year. Mr. Al-Muslimi, I hope I pronounced your name close to correct, thank you for traveling from Yemen to join us today. I am looking forward to your testimony.

Please proceed.

STATEMENT OF FAREA AL-MUSLIMI, SANA'A, YEMEN

Mr. AL-MUSLIMI. Thank you, Chairman Durbin and Ranking Member Cruz for inviting me here today. My name, as you mentioned, is Farea Al-Muslimi and I am from Wessab, a remote village mountain in Yemen.

Just 6 days ago my village was struck by an American drone in an attack that terrified the region's bull farmers. Wessab is my village, but America has helped me grow up and become what I am today. I come from a family that lives off the fruit, vegetables, and livestock we raise on our farms.

My father's income rarely exceeded \$200. He learned to read late in his life and my mother never did. My life, however, has been different. I am who I am today because the U.S. State Department supported my education.

I spent a year living with an American family and I attended an American high school. That was one of the best years of my life. I learned about American culture, managed the school basketball team, and participated in trick or treat at Halloween.

But the most exceptional experience was coming to know someone who ended up being like a father to me. It was a member of the U.S. Air Force. Most of my year was spent with him and his family. He came to the mosque with me and I went to church with him and he became my best friend in America.

I went to the U.S. as an ambassador for Yemen and I came back to Yemen as an ambassador of the U.S. I could never have imagined that the same hand that changed my life and took it from miserable to a promising one would also drone my village.

My understanding is that a man named Hammed Al-Radmi was the target of the drone strike. Many people in Wessab know Al-Radmi and the Yemeni government could easily have found and arrested him. Radmi was well known to government officials and even to local government, and even local government could have captured him if the U.S. had told them to do so.

In the past, what Wessab villagers knew of the U.S. was based on my stories about my wonderful experiences here. The friendships and values I experienced and described to the villagers helped them understand the America that I know and that I love.

Now, however, when they think of America, they think of the terror they feel from the drones that hover over their heads ready to fire missiles at any time. What the violent militants had previously failed to achieve, one drone strike accomplished in an instant. There is now an intense anger against America in Wessab.

This is not an isolated instance. The drone strikes are the face of America to many Yemenis. I have spoken to many victims of U.S. drone strikes like a mother in Jaar who had to identify her innocent 18-year-old son's body through a video in a stranger's cell phone, or the father in Shaqra who held his 4- and 6-year-old children as they died in his arms.

Recently in Aden I spoke with one of the tribal leaders present in 2009 at the place where the U.S. cruise missiles targeted the village of Al-Majalah and Lawdar, Abyan. More than 40 civilians were killed, including four pregnant women. The tribal leader and others tried to rescue the victims, but the bodies were so decimated that it was impossible to differentiate between those of children, women, and their animals.

Some of these innocent people were buried in the same grave as their animals. In my written testimony I provided detail about the human cost of this and other drone strikes based on interviews I have conducted or have been part of.

I have a personal experience of the fear they cause. Late last year I was in Abyan with an American journalist colleague. Suddenly I heard the buzz. The local people we were interviewing told us that based on their past experiences, the thing hovering above us was an American drone. My heart sank. I felt helpless. It was the first time that I had truly feared for my life or for an American friend's life in Yemen.

I could not help but think that the drone operator just might be my American friend with whom I had the warmest and deepest re-

lationship. I was torn between this great country that I love and the drone above my head that could not differentiate between me and some AQAP militants. It was one of the most divisive and difficult feelings I have ever encountered. I felt that way when my village was also droned.

Thank you for having this hearing. I believe in America and I deeply believe that when Americans truly know about how much pain and suffering the U.S. air strikes have caused and how much they are harming efforts to win hearts, minds, and grounds in Yemen and hearts and minds of the Yemeni people, they will reject this devastating targeted killing program. Thank you.

[The prepared statement of Mr. Al-Muslimi appears as a submission for the record.]

Chairman DURBIN. Thank you, sir.

General Cartwright, in a recent speech before the Chicago Council on Global Affairs, you noted your concerns about potential reaction to targeted strikes. In that speech you said if you are trying to kill your way to a solution, no matter how precise you are, you are going to upset people even if they are not targeted.

General Stanley McChrystal has also stated that the resentment created by American use of unmanned strikes is much greater than the average American appreciates. Mr. Al-Muslimi's testimony provides a chilling example of how these strikes can undermine our efforts to win the hearts and minds of the very people we are relying on to provide us intelligence and ultimately be our allies.

Are we trading short-term tactical success of killing individual targets for the long-term strategic failure by sowing widespread discontent and anger?

General CARTWRIGHT. Senator, I cannot talk to specific operations.

Chairman DURBIN. I understand.

General CARTWRIGHT. But I am worried that we have lost the moral high ground for many of the reasons that the witnesses have talked about, and that some element of transparency in process, in decisionmaking, in the understanding not just of those who actually make decisions, but of the people of this country and the people of the countries that we are working in is going to be essential to find our way back to that moral high ground.

I believe that if people understand what the options are and the choices are and that they are reviewed and they are basically, as we do in our judicial system, in an adversarial way looked at with a very jaundiced eye about whether we want to proceed or not to proceed, that we can move in a direction that is far better than where we are today.

But I believe that in several areas around the world, the current drone policies have left us in a position where we are engendering more problems than we are solving.

Chairman DURBIN. Wouldn't you also, I am sure, acknowledge that because of the classified nature of information that is being used to target and protecting the sources and methods which we are using to find that information makes transparency if not challenging, impossible?

General CARTWRIGHT. I would say challenging but not impossible. In other words, it is not necessary to provide the secret sauce

to provide an understanding of why you are doing what you are doing, how you are making the decisions and why they are necessary and that you have reviewed alternative choices in that decision process. I think that is the important part to get out.

I do not disagree that again, as I said in my testimony, that the policy that we are following in the global war on terrorism is a policy that I support, but it is the means and the methods here that I think we have to take a look at and seriously reflect on.

Chairman DURBIN. Professor Brooks, I am just looking down the panel to see who might have been here in 2001 to cast the vote on the Authorization for the Use of Military Force.

I can remember there were two votes. One relative to the invasion of Iraq and 23 of us voted in the negative. And then the second vote which we considered to be the direct answer to 9/11 for the invasion of Afghanistan, the direct assault on Al-Qaeda. Virtually all Members of the Senate voted in favor, and I believe all of them did if I am not mistaken.

At the time though I do not think there is a single Senator who would say that they envisioned 12 years later that we would be ending the longest war in our history and that we had created an authorization for an ongoing war-like effort against Al-Qaeda operatives and their associates.

I guess my question to you is whether or not the AUMF, the Authorization for Use of Military Force, is adequate to the task of protecting America when we are still menaced and terrorized by those who would do us evil and whether or not there needs to be a revisit of that AUMF to determine whether it should be stronger or more specific.

Professor BROOKS. Senator Durbin, I would be inclined to urge Congress to repeal the 2001 AUMF. I think that the President already has ample power as the Commander in Chief and as the Chief Executive of the United States to use military force when it is necessary to protect the United States from an imminent threat and imminent and grave threat.

But I would emphasize the words imminent and grave. I think that in the absence of an Authorization to Use Military Force, we would very likely see the executive branch perceive itself as constrained to do a more careful analysis of the importance of using military force, particularly in context where it is a targeted killing in a foreign country which raises sovereignty issues among other things.

I share my colleague's view that there is nothing inherently wrong about the use of targeted killing as a counterterrorism tool or in the context of armed conflicts, but I do think that we have gotten well beyond, as you suggest, what the drafters of the AUMF and those who voted for it could ever have imagined. We have stretched it from Al-Qaeda and from the actual language of the authorization which focused very squarely on those with responsibility in some way for 9/11 and on preventing future attacks such as that on the United States. We have begun to shift, as my colleagues have said, to those who you might say are further and further down the terrorist food chain, not so much senior operatives, but lower level militants and suspected militants.

We have also shifted to focusing on organizations that would not necessarily fit that AUMF definition, such as Somalia's Al-Shabaab. It is not that clear that they would fit the definition in terms of either any link to the 9/11 attacks or in terms of any capability, capacity, and inclination to focus on the United States.

Chairman DURBIN. I guess what I am driving at is this. I think the definition of our enemy in that AUMF, as Al-Qaeda and associates, could certainly be challenged today in terms of terrorism threats to the United States. I think some have gone far afield from the original Al-Qaeda threat, but there are still realistic threats. So the definition of our enemy, our enemy combatant, would have to be carefully considered in that context.

Second, I would think that we now are challenged to define the battlefield and where we can engage in targeted killing and what it takes to authorize us to go into Somalia, Yemen, Pakistan, Afghanistan or nations in Africa.

Where is that battlefield? It seems like it can change almost on a daily basis and still be a threat to the United States.

I would say having been through this debate—my time is about up here. Having been through this debate in the House and the Senate over the authority and responsibility of Congress to declare war on behalf of the American people that I do not think our founding fathers in their wisdom could have envisioned quite what we are facing today in trying to keep this country safe.

Senator Cruz.

Senator CRUZ. Thank you, Mr. Chairman. I would like to take the opportunity to welcome and thank Senator Grassley who is the Ranking Member on the Full Committee for joining us at this important Subcommittee hearing and with unanimous consent, I would like to offer Senator Grassley the opportunity to ask his questions before I ask mine—

Senator GRASSLEY. I will wait my turn. Go ahead.

Senator CRUZ. Very well. Thank you and welcome, Senator Grassley.

I appreciate each of the witnesses coming here and for presenting very learned and very provocative testimony on this critical issue. I would like to begin by posing to each of you the hypothetical that I posed to Attorney General Holder, because it seems to me on the question of what is the permissible use of legal force there are ends of the spectrum that are relatively easy to answer and then there are areas in the middle that raise far more complicated legal questions.

It seems to me that there is no serious question that if a foreign national is overseas and is actively taking up arms against the United States, that lethal force can and probably should be used against that foreign national in those circumstances.

Likewise, it seems clear to me that the answer to the hypothetical I posed to the Attorney General is simple and straightforward, and that hypothetical was, if a United States citizen is on U.S. soil and we have intelligence to suggest that that individual is a terrorist, is involved with Al-Qaeda, but at that moment that individual poses no imminent threat, indeed if that U.S. citizen is sitting on U.S. soil at a café in Northern Virginia, does the Con-

stitution allow the U.S. Government to use a drone to kill that U.S. citizen on U.S. soil?

Now, in my view the answer to that question is simple and straightforward, it should be absolutely not. The question I would like to pose to all six of you is, does anyone disagree with me on that? Does anyone disagree that the Constitution does not allow killing a U.S. citizen on U.S. soil if that individual does not pose imminent threat?

General CARTWRIGHT. I agree with you.

Senator CRUZ. I am encouraged by that answer. I wish the Obama administration had accepted this Subcommittee's repeated invitations to send a representative because the last time the Attorney General was here, he was quite reluctant to pose that answer that all six of you just gave.

It seems to me there are many difficult questions about the use of drones in our current policy in using them overseas. There are strategic questions. Using a drone strike to take out a terrorist or even a leader of Al-Qaeda means necessarily that that individual will not be apprehended, that individual will not be interrogated, we will gain no actionable intelligence, and we will not, as a result of any interrogation, be able to prevent acts of terror in the future.

Of course with a drone strike, the risk of error is such that if that individual is not who we think it is, there is no process to correct that mistake. The consequences of mistakes are significant.

That being said, the ambit of this Committee is the Constitution, and that is the principal focus of this hearing. I would like to ask a question of Professor Brooks and Professor Somin which is it seems to me that on the question of the constitution's parameters, if we agree with the two extremes I suggested, then you get into the whole gray area in between.

I want to suggest four possible criteria and get both of your thoughts as to how each of those criteria impact the constitutional question. The first is the individual that is the target of the drone strike, whether that individual is a United States citizen, whether that individual is a legal permanent resident, or whether that individual is a foreign national.

The second possible criterion that may be relevant to the constitutional inquiry is the location. Is that individual on U.S. soil or is that individual overseas? A third possible criterion is whether that individual is actively affiliated with a foreign hostile force such as Al-Qaeda. A fourth possible criterion is whether that individual poses an imminent threat of violence.

I will note one of the concerns I have about the white paper that was released on NBC is the definition of imminent threat in my view that this administration has put forward is exceedingly broad. So I would ask both Professor Brooks and Professor Somin to address your views of the constitutional relevance of each of those four criteria and to the extent imminent threat is important, how should it properly be defined in cabin so that it is a relevant qualifier?

Professor BROOKS. Thank you, Senator. I think that those are perfectly reasonable criteria. I think that the administration as well has put out very similar criteria. The trouble is, the devil is in the details as you suggest.

We can say well, if someone meets the criteria of being a member of a foreign force that is taking up arms against the United States or something like that, then they become targetable. No one will disagree with that on broad principle. The trouble is who decides what constitutes evidence, what if you make a mistake and so forth. The same is true for all of those other criteria.

No one will disagree with the notion that the United States has the authority and indeed the President has the inherent authority, AUMF or no AUMF, to use military force in the context of a threat of an imminent and serious attack against the United States. But as you suggest, that term “imminence” has gotten pretty squishy in the administration’s legal memos that we have seen so far.

I think that is why I would highlight not so much the criteria in the abstract, but creating adequate mechanisms to ensure sufficient transparency consistent obviously with the classification concerns and to ensure oversight and accountability in the case of abuse and mistakes.

There is one other thing I would add though. To me, we not only have a constitutional question, but we also have a broader rule of law question. In the Declaration of Independence, our forebears spoke of inalienable rights that all men had, and today we would talk about human rights.

The fact that someone is not a U.S. citizen—while it does mean that they do not have the specific protections of our constitutional law—obviously should not make us care less about their legal recourse in the event that they are wrongly or abusively targeted.

Again, while I am fully confident in my colleague’s—in the administration making their very best efforts to prevent abuse in error, I do not know that that is a very firm foundation for thinking about the rule of law more generally and in the future.

Professor SOMIN. Thank you very much for the question. I think each of the four points you raised are potentially important in different situations. Let me briefly try to give a few thoughts on each of them.

One is the question of whether the individual is a U.S. citizen or a foreign national. As I noted in my initial testimony, a U.S. citizen can potentially be an enemy combatant in a war and that does make him or her a legitimate target if he is. However, there are special constitutional problems that arise with abusive targeting of U.S. citizens where doing that might be a violation of the Fifth Amendment. It is less clear whether the Fifth Amendment applies to foreign nationals outside of U.S. soil.

Obviously even if it does not, targeting an innocent civilian is still illegal under various domestic and international laws even if they are not a U.S. citizen. But the constitutional issues might potentially be different.

The question of location, your second criterion, I think is more fully covered in Professor Brooks’ written testimony. I would tentatively suggest that there is a reasonable distinction that should be drawn between terrorists or suspected terrorists located in areas where either the government is supporting the terrorists or they do not have meaningful control over what is going on in their area versus countries where there is a rule of law and where we can legitimately resort to working with that government and appre-

hending these people by peaceful means, or at least without resorting to lethal force in the first instance.

Third, I think it does make a significant difference whether the individual in question is actually affiliated with Al-Qaeda or one of its associates or whether he is an independent operator or affiliated with some other unconnected group.

The Authorization for the Use of Military Force does not give the President the authority to target any and all potentially hostile groups. It is specifically limited to “those nations, organizations or persons that the President determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001 or harbored such organizations.”

It seems to me that while we are at war with the organizations listed in the AUMF, we are not at war with all potentially dangerous groups. To the extent that some of the targeting has gone beyond that level, then the laws of war may not apply in the same way and it does make a difference. One of the things that I urge in my written testimony is that Congress consider not abolishing the AUMF but clarifying it to more clearly delineate what, if any, other groups beyond those listed are legitimate targets.

Finally, on the question of imminent threat, I think as I noted in my written testimony that for groups that we are at war with, we can target them even if they are not an imminent threat. For people who are not covered by the AUMF, I think how imminent a threat they pose is an important issue and one that perhaps we can address in more detail later. I do not want to take up too much time. Thank you.

Senator CRUZ. Thank you, Mr. Chairman.

Chairman DURBIN. Thank you very much. Before recognizing Senator Franken, I ask consent to enter a statement by the Chairman of the Committee, Senator Leahy, without objection will be entered.

[The prepared statement of Chairman Leahy appears as a submission for the record.]

Chairman DURBIN. Senator Franken.

Senator FRANKEN. I want to thank the Chairman for holding this important hearing. Obviously drone strikes have transformed the way we conduct war and this transformation has given rise to vocal opposition and extensive public debate.

You know that we are dealing in new, strange territory when Senator Cruz and I have the same questions. Imminence was one I wanted to talk about in this new standard which seems really broad to me too, Senator.

I think this debate and discussion is important, which is why can you believe the legal justification for these strikes—they need to be made public in a suitable form.

I went to the secure room and looked at some of these memos and after reviewing them, I do not understand why the expert redactors at the Department of Justice could not have just stripped out any of the national security information, the sources and methods that need to be redacted and make the legal analysis public. I was also disappointed that the administration did not send a witness today as was the Chairman and Ranking Member.

I have long argued that the Department should not practice secret law and should make all of the Office of Legal Counsel's opinions available to the public. I think transparency and accountability are very important, especially for an issue as sensitive as this.

I am also troubled that this has not been released to Congress, all the memos related to targeted killings.

As far as the question that the Ranking Member asked, this is not my question, it came from another Senator. He has not authorized me to ask this, or she. See? I can be a secret agent, too.

This just in terms of targeting U.S. citizens, we had a situation in Boston where we had a guy holed up in a backyard in a boat. He, for all accounts, had explosives on him. They did send a robot in actually to go in and take off the tarp over the boat. But isn't it possible that we could see a situation in which we might want to take that person out in a different way, as odd as that is for me to ask. It feels odd, but anybody have an opinion on that?

I mean, the Attorney General answered the question about, well, actually Senator Paul's question, does the President have the authority to use a weaponized drone to kill an American not engaged in combat on American soil. Eric Holder said no, but does anyone have an opinion on that?

General CARTWRIGHT. I would like to comment on the approach, I will let the lawyers talk about the law side of it. There were in that scenario, and many other hypothetical scenarios that you could walk through, inside the United States so many other means by which we can approach this situation safely and ensure that if the last act was for the individual to stand up and put their hands in the air that we would not revoke that right of the individual to give up.

So to me, to stand off and shoot in the case of a drone is normally scenario-dependent and not something I could answer.

Senator FRANKEN. Well, we would only resort to that obviously. This is maybe arguing angels on the head of a pin, so I will move on.

Professor Brooks? Sorry.

Professor BROOKS. The only thing I would say is I think it is very important to distinguish between the kind of weapon and the kind of legal framework. A weapon that is released by a remotely piloted vehicle or a robot is just a weapon.

We have very clear rules in the domestic law enforcement context about when police can use lethal force. Those are clear. As long as we have that clear legal framework, the lethal force is sort of irrelevant what means you use.

The problem is not the drone hypothetically being used as opposed to something else. I think the problem is whether we think that we have to abide by the normal rules that govern police use of lethal force or whether we think we are in a law of war environment in which, as Professor Somin noted earlier, you can target an enemy combatant while he is sleeping. He does not need to pose any imminent threat. You are targeting based on his status, not based on his activities.

Senator FRANKEN. All right. Since we are talking about the method we use, and we are talking about blowback, Mr. Bergen and Mr. Al-Muslimi, very disturbing testimony.

This might be to you, Professor Brooks or to Mr. Bergen or anyone. We have blowback when we do manned air strikes. What is the difference?

In other words, I think you wrote in your testimony—I am sorry I was not here Professor Brooks for your oral testimony, but that there are obviously civilian casualties when we do manned air strikes.

Is there a qualitative difference? Is there really? Anyone who wants to answer that.

Colonel MCSALLY. Senator Franken, this goes to the heart of what I was trying to get in my testimony which is once you have answered the question that it is legal to do a strike and that it is good strategy to do a lethal strike, when you are then selecting the platform, a remotely piloted aircraft actually gives you better precision with a small warhead with persistence overhead with the ability to abort at the last minute with the whole chain of command and the lawyers watching with the intel analysts who are not getting shot at.

So once you have decided to actually conduct a strike, the RPA's provide unprecedented persistence and oversight. When we are using ground forces, special operations, artillery, fighter aircraft, which I have done many times, you do not have that same level of oversight. You often have in some cases individuals on the ground talking with aircraft overhead whose buddies have just been shot up and their perspective is skewed. So you are making decisions in the heat of the battle.

We do that with great precision as well, but in this case when we are talking about counterterrorism operations and we are having to choose the platform, oftentimes we are talking about places where we do not have American forces and then we have to decide whether we want to risk American forces to go in there either on the ground or in the air.

The RPA's do give us an asymmetrical capability where we do not have to risk American forces. That is not a bad thing that we are not risking American forces once we have decided it is important to conduct a lethal strike. So this does provide greater lethality and persistence in the ability to abort than other assets.

Professor SOMIN. Just one small comment on that question. I think the key point as I tried to stress in my written testimony is that what matters is not whether we are using a drone or a bomb or a plane or even a sword or a dagger. That is not what matters from a moral or legal point of view. What matters is whether we are choosing the right target.

If we have chosen the right target, then we are entitled to use all appropriate weapons and I think it would be a mistake to ban a particular technology, particularly if, as in this case, it is sometimes more accurate and discriminating than other alternatives.

Senator FRANKEN. Mr. Al-Muslimi raised his hand. What I wonder is and I think you will speak to this, is that this new type of warfare, and Mr. Bergen has spoken to the number of countries now, 70 that they are in, is it a different kind of blowback?

Is there a different kind of reaction because of the very nature of it?

Mr. AL-MUSLIMI. Yes. I think the main difference between this is it adds into Al-Qaeda propaganda of that Yemen is in a war with the United States. The problem of Al-Qaeda if you look to the war in Yemen, it is a war of mistakes.

The less mistakes you make, the more you win. The drones have simply made more mistakes than AQAB has ever done in the matter of civilians. You are also neglecting a very simple fact which is you actually can capture this person. It is not impossible. Just like the last time recent in my village. You could have captured this person and that is a big blowback.

AQAB power has never been based on how many numbers it has, whether it has 1,000 or 10,000. Actually the difference is not that much. It is about how much logic it has on the ground and how much it can convince more Yemenis that they are in a war with the United States.

The drones have been the great tool they have used to prove that they are in a war with the U.S. I think that is the main blowback that is not with the ground forces, especially if there is ground forces. The ground forces of Yemen can capture them, actually, and have information from them.

Senator FRANKEN. Thank you for that chilling perspective.

Mr. Chairman.

Chairman DURBIN. Thank you. It is my understanding Senator Grassley will have a chance to ask questions at this point.

Senator GRASSLEY. All right. First of all, permission to put a statement in the record.

Chairman DURBIN. Without objection.

[The prepared statement of Senator Grassley appears as a submission for the record.]

Senator GRASSLEY. Professor Somin, I am going to immediately go to a question instead of a lead in to it because as a follow-up on the discussion you had with Senator Cruz, is the current AUMF broad enough to encompass targeted strikes ordered by a President, or in this case President Obama, or should Congress broaden the AUMF in order for these strikes to continue?

Professor SOMIN. Without knowing the full details of all the targeted strikes that have been done, it is hard for me to say which of them, if any, cannot be covered by the AUMF, though I suspect based on what is on the public record that some are at least questionable.

I think Congress should try to amend the AUMF to more precisely define what kinds of groups we can target if we do want to target as I think, perhaps, we do, some groups that are not covered by the AUMF.

Ideally what we want is the ability to target organized groups who are waging war against us, but at the same time not give the President a blank check to target whatever groups he or someone else in the administration might consider it might be a good idea to go after if they are not really waging a war against us.

I do not think you should completely repeal the AUMF. But some revisiting and clarification is definitely desirable.

Senator GRASSLEY. Do you think the Constitution provides a sufficient basis for the President to order these targeted strikes absent reliance upon that law?

Professor SOMIN. It depends on what strikes we are talking about. Strikes that do deal with imminent threats, defined relatively narrowly, could perhaps be justified as defense against attack. But beyond that I think one cannot launch strikes against groups that are not covered by the AUMF.

Senator GRASSLEY. I did not direct this to you, Colonel McSally, but what is your view on my last question about the Constitution versus absence reliance upon the AUMF?

Colonel MCSALLY. Sir, I am not a legal expert, but I will say that Article II of the Constitution, if the target is an imminent threat, then that clearly is authorization in and of itself.

Where AUMF comes in is when you do not have that imminent threat criteria, but you have Al-Qaeda, Al-Qaeda leaders, Al-Qaeda affiliates that are specifically designated through the intelligence process in order to allow them to be legitimate targets.

So just speaking broadly in my work in Africa Command which actually I think has the highest level of scrutiny of the areas that we are talking about, it was a very high level in order to make the case that individuals or organizations fit the criteria of AUMF. That bar was very high and those discussions were at the very highest level of the chain of command before anybody was approved.

Senator GRASSLEY. My next question, Professors Brooks and Somin, you both suggested today that one of the problems with the current drone strike procedure is oversight, specifically who determines the targets, how they do so, and how much evidence they might need.

One solution some have raised is an independent court that reviews administration targets prior to drone strikes similar to the current FISA court that reviews foreign intelligence operations.

Critics of this proposal note that a court would be misleadingly comforting to the public because they are not experts in warfare. Further, the use of such court raises separation of power concerns.

Question: Do you think that a special FISA type court is a good idea to provide independent oversight of the administration targeted killing program? And then let me follow up. Would such a court be constitutional?

Professor SOMIN. In brief, I think it would be constitutional and certainly most agree that the FISA court is. There can be legitimate questions about how such a court would be set up and how it would be run and some scholars that I cite in my written testimony have discussed this in some detail.

I think the issue of the people on it not being expert enough can be overcome simply by appointing lawyers and others who do in fact have a background in relevant military issues.

There is always, of course, a danger of false comfort or complacency. But I think such an institution by providing an outside check on executive discretion can at least prevent the most serious abuses that can possibly arise. Nothing can solve all our problems completely. But our goal should be to at least try to minimize them and reduce them relative to what might otherwise occur.

Professor BROOKS. Senator, I agree that one could devise such a court that would pass constitutional muster. I would note, however, that many of the issues associated with a court that would approve in advance targeting decisions could be eliminated by shifting the focus. Specifically, if Congress were to create a statutory cause of action for damages for those who had been injured or killed in abusive or mistaken drone strikes, you could have a court that would review such strikes after the fact. Having such a court might eliminate a lot of the problems associated with having judges acting in advance but still create a pretty good mechanism that would frankly keep the executive branch as honest as we hope it is already and as we hope it will continue to be into administrations to come.

Also, there is no inherent reason that such a court would need to operate in the extreme degree of secrecy that we have seen with the FISA court. There is no inherent reason that you could not have at least declassified portions of opinions. Something like that is not the only potential solution to the various oversight and accountability problems, but I think it would certainly be one of the approaches that would go a very long way toward reassuring both U.S. citizens and the world more generally that our policies are in compliance with rule of law norms.

Senator GRASSLEY. My last question will go to Professor Somin. In your statement, you identified two key issues with the administration's current approach on drones. First, who in the administration decides who should be targeted, and second, how much proof they need to actually order a strike.

You note that the administration's white paper did not actually answer these troubling questions. Indeed we have seen that the administration is reluctant to share its process with the American people.

Two questions. First, do you think it would be beneficial for the administration to publicly disclose its current drone targeting procedures so that the people know how those officials determine who to kill during targeted drone strikes? Second, what do you think would be the proper burden of proof in these targeted drone strikes?

Professor SOMIN. Senator, those are, I think, both good questions. Like many of the other panelists and the Senators on the Subcommittee, I agree that it would be desirable to disclose the legal basis and criteria that are used, obviously, consistent with not disclosing classified intelligence and methods and sources and the like. I think it is legitimate to ask the administration to do that.

In terms of what the burden of proof should be, I am not sure I have a clear opinion of the exact precise standard. Realistically it probably should be lower than the beyond a reasonable doubt standard that we use in criminal cases because the nature of war probably does not allow proof to that high level. But it should certainly be more than a minimal level of proof. Some scholars such as Amos Guiora have proposed various standards of proof and I think that ultimately we should aim for a standard that is realistic in war but also provides us with at least a substantial degree of confidence that we are not targeting people recklessly and that we have at least substantial and extensive intelligence backing the decision.

Senator GRASSLEY. Thank you, Mr. Chairman, and thank you panel.

Chairman DURBIN. Thank you, Senator Grassley.
Senator Blumenthal.

Senator BLUMENTHAL. Thank you, Mr. Chairman, and thank you for holding this hearing and thanks to our Ranking Members as well.

I think we are wrestling with a lot of these profound questions and wrestling on a very bipartisan basis as you have seen because we are struggling with issues not only of constitutional law, but also of conscience and conviction and morality, not to mention the profound foreign policy implications that may be involved.

I want to thank Mr. Al-Muslimi for giving us the insight into the chilling unintended consequences of possible mistakes in this area. I have to assume they were unintended consequences because simply we have that faith in the good intentions of our military and of the decisionmakers who are guiding this process.

Stepping back for a moment, one question on my mind is whether the rules applicable to drones—and they are in the title of this hearing, call them unmanned aerial vehicles or remotely piloted aircraft. Whatever they are called, whether those rules really should be fundamentally different than they are for any targeted strike.

Colonel, as you have pointed out, when the decision is made to do a targeted strike, assuming that decision is justified by imminent threat or all of the other criteria, then we have a set of tactical weaponry at our disposal. It may be boots on the ground, fighter aircraft, cruise missiles, or artillery.

Very often remotely piloted aircraft are more precise, quicker and more reliable with less cost both in terms of collateral damage and potential threat to our own troops. So I guess the question on my mind is should the rules be any different for this new form of weaponry?

The rules are obviously different for nuclear strikes in some sense and we are developing rules for cyber warfare as General Cartwright has made the point very aptly and powerfully. But let me begin, Colonel McSally, and then perhaps to you, General Cartwright.

Knowing the nuts and bolts of this kind of weaponry, should the rules be any different for remotely piloted aircraft, a term which I agree probably more aptly and accurately describes this kind of weaponry, than the other targeted strikes?

Colonel MCSALLY. Thank you, Senator. Absolutely I think the answer is no, the rules should not be different. A remotely piloted aircraft is simply a tool to meet our objectives once we have decided that we want to meet those objectives and it is legal to meet those objectives.

This discussion actually reminds me a little bit about after World War I when our pioneer of air power, Billy Mitchell, was trying to make the case that we could take out naval ships with air and nobody could believe him and we thought that was ridiculous. Then he had to make that case and there was a whole lot of angst over using this new tool of air power in order to meet our objectives.

We eventually got to the point where we are very comfortable using air power in certain circumstances versus ground forces or a naval gun fight in order to meet our military objectives.

I think this is a very similar transformation that we are going through. This discussion and the debate is all certainly worth having. I think where we need to have our focus is the transparency on the legal argument and the transparency on the justification for our counterterrorism strategy for use of lethal force and focus it there and then keep this remotely piloted vehicle discussion, remotely piloted aircraft as a tool that we are using that is an asymmetrical advantage that we have and if we are in a fight, it is okay to have an asymmetrical advantage. You do not have to risk American lives if you need to use lethal force to meet your objective, so why would we when we have the capability to do it in a way that is cheaper, more persistent, and less risk to American lives?

I think the rules should not be different and I think this discussion is worthy. But I will also say from a military process, there are really two elements that we go through. One is, how do we approve an individual to be an approved target? The second process is, then what do you go through in order to actually get approval to strike and to conduct the strike?

This is where I think we need to be focusing the discussion. This process right here, also you could raise or lower the bar based on discussions here today of are we hitting higher level or lower level, but from my experience there is a whole lot of precision and scrutiny in this second part and we need to be focusing on this first part.

Senator BLUMENTHAL. Do you agree, General?

General CARTWRIGHT. I do agree. I think one of the opportunities here that remotely piloted aircraft can offer us is that there is more decision time, therefore more review time, therefore a better opportunity to be sure.

There are more eyes on the issue in an environment where they can make decisions, so it offers us opportunity that we probably have not taken advantage of.

Senator BLUMENTHAL. Conversely, anybody who is familiar with the history of war knows that abuses in the use of aircraft bombing, carpet bombing involving unintended damage or perhaps sometimes intended damage to civilian populations is endemic to the history of warfare and sometimes used by our enemies. Unfortunately in some instances in the past, used by the United States.

We are dealing here with a set of questions that has persisted for some time.

Let me focus and again to you, Colonel McSally, because Mr. Al-Muslimi raises the issue and I think it is a very legitimate issue that somehow there is the appearance, the perception of greater damage and possible mistakes associated with this kind of weaponry, this tool. Is that a fair criticism do you think?

Colonel MCSALLY. Well, I cannot speak specifically, Senator, about operations in his country, but I can say that the capability does exist to make sure that we minimize civilian casualties. The process that I have been through and I am familiar with is one where we have to meet a very high level of positive identification once a target has been approved as a target, that we have actually

met the criteria of positive ID, that we have met the criteria of geographic location with a variety of different sources, again, it is with high confidence and that we have done a very thorough collateral damage assessment which is a very detailed process that we go through.

Again, I would encourage you all to get the classified briefing on that process and how we do that and to make sure that we do not have unintended civilian casualties. So we do have the process available and in the case that you so eloquently have been sharing about the impacts of some of the strikes going on in his country, I think we do need to take a look at the scrutiny of who is on that list, again in that first portion and then making sure that the operators have the appropriate bar of positive identification and geographic location and their collateral damage assessment.

We do have the capability and we have done it in the past and this testimony shows that we need to ensure that that is very high because the unintended consequences are severe.

Senator BLUMENTHAL. My time has expired, but if the Chairman allows, if Mr. Al-Muslimi has any comment.

Chairman DURBIN. Of course.

Mr. AL-MUSLIMI. Thank you. I would say one of the things that are needed the most are say who is on this list. A lot of the mistakes also that have happened is because I do not know if this person is a target or not, therefore he is welcomed anywhere he goes and that has made a lot of mistakes that have happened.

A lot of killing has happened simply because people do not know that this person is a target and not just that he was not tried to be arrested.

Another issue it has blowback of making people fear the U.S. more than fearing AQAB. I met the lady or the man from Nader in the middle and what he say is that in the past women used to tell their children go to sleep or I will call your father. Now they say go to sleep or I will call the planes.

That has shifted the whole conversation, or the whole thing of this. In addition, it is not just any qualitative blowback of this specific example, but more importantly it is a killing legitimacy of the government which is killing, making it look like the American public in Yemen, making other countries like Iran, making use of this, and it has done much more than you can imagine.

Chairman DURBIN. Thank you.

General CARTWRIGHT. Senator, just real quick.

Chairman DURBIN. Yes, General.

General CARTWRIGHT. I worry here. What we have seen with drones is that without precise targeting on the ground, precise information and intelligence that is verifiable, that that is generally when we have errors. So we need to look at that end of the process.

In whatever process we put together, we need to ensure that the intelligence that drives the targeting is also part of the scrutiny. If we miss that, then we rely as you say just on the drone, we have challenges.

Senator BLUMENTHAL. Thank you. Thank you, Mr. Chairman.

Chairman DURBIN. Senator Graham.

Senator GRAHAM. Thank you, Mr. Chairman. I would just like to say for the record that no system is perfect, but generally speaking

I want to applaud the Obama administration's what I think is an aggressive and responsible use of the drone program, particularly in parts of the world where we do not have ground forces or a whole lot of control to make the rest of us safe.

I do not get to say many good things about President Obama in South Carolina, but I will say that I think he is serious, I think he is thoughtful, and I think he takes the responsibility when it comes to targeting people in a very Commander-in-Chief-like way.

General Cartwright, as a Marine, when you are ordered into battle by your Commander in Chief, do you obey his orders?

General CARTWRIGHT. I do.

Senator GRAHAM. I find it a bit odd, quite frankly, that we are going to give the Commander in Chief, under the Constitution by the way, the authority to order our own citizens into battle but they do not get to go to court.

The Marines do not get to say, "I think that is a dumb decision, I want to go get a judge to say, 'hey, you should not go.'"

My belief is that there is nothing more basic to being Commander in Chief than being able to order people into battle and being able to suppress the enemies of this Nation. If you want to talk about transparency, count me in, if you want to talk about having Congress more involved in how the system works. But if you are contemplating conferring the power from the Commander in Chief to a bunch of unelected judges to make wartime decisions, count me out. That would be to me a breathtaking overstepping and quite frankly, unfair to the courts because if there is a situation where they get a case and they say no, we do not think you are quite there and that person winds up killing a bunch of Americans, there would be outrage in this country like you have never seen and the court cannot defend itself.

But here is where elected officials have a different standing. The President of the United States would have to answer to the people about any mistakes he made. So count me in for reforming the system. Count me out for basically turning the war into a crime.

Now, the Doctrine of Preemption, do you think that is a solid doctrine, Mr. Bergen, in the war on terror?

Mr. BERGEN. It all goes to the question of imminence, sir.

Senator GRAHAM. Well, the theory being that basically when it comes to Al-Qaeda and Taliban and other folks, it is better to hit them before they hit you.

Mr. BERGEN. If you look at the victims of these strikes, overwhelmingly now they are lower level members of the Taliban. So the question is do they pose an imminent threat?

Senator GRAHAM. All right. Let us talk about that. General Cartwright, you are in Afghanistan. You walk up on a bunch of Taliban guys that are asleep. Do you have to wake them up before you shoot them?

General CARTWRIGHT. No.

Senator GRAHAM. Why?

General CARTWRIGHT. Because it is an area of hostility and he is a legitimate military target, or they are.

Senator GRAHAM. Mr. Bergen, that is the point. Once you are designated an enemy, we do not have to make it a fair fight. We

do not have to wake you up, we are going to shoot you. The point is do not become part of the enemy.

Here is the problem. How do we know if you are part of the enemy? That is a legitimate, honest inquiry here. So what I am suggesting is that we kind of back off and look and see the goal we are trying to accomplish. What is your name again, sir? I do not want to mispronounce your name.

Mr. AL-MUSLIMI. Al-Muslimi.

Senator GRAHAM. I have been to Yemen. It is a country in great turmoil. Do you agree with that?

Mr. AL-MUSLIMI. A country of?

Senator GRAHAM. Great turmoil. Great conflict.

Mr. AL-MUSLIMI. They definitely have a lot of problems.

Senator GRAHAM. All right. I understand that. Mr. Bergen, would you have advised President Obama to call the Pakistani government up to go arrest Bin Laden?

Mr. BERGEN. Well, it was discussed and it was rejected.

Senator GRAHAM. Can you imagine what would have happened if it came out in the public that we told the Pakistani government Bin Laden is over here, go get him and he got away? My party would have eaten President Obama alive.

The reason President Obama did not do that in all candor is you cannot trust the Pakistan government to go pick up Bin Laden. In all due deference to your country, there are places in your country I would not tell anybody about what we were up to because I think the person that we are trying to capture or kill would wind up knowing about it.

Your point is why do we not arrest the guy in the village? Nothing would please me more to be able to arrest somebody to interrogate them, but the world in which we live in is if you share this closely held information, Colonel McSally, you are going to wind up tipping off the people we are trying to go after. Do you agree with that?

Colonel MCSALLY. In some cases, absolutely, sir.

Senator GRAHAM. So I just want to put people in President Obama's shoes for a moment. What do you share and who do you share it with? Who do you pull the trigger on and who do you give a pass?

All I can say is that he above all others and the next person to occupy that office needs to have a reasonable amount of deference but not unchecked power. We have one Commander in Chief, we cannot have 535 Commanders in Chief. So Mr. Chairman, I am glad we are having this debate.

When it comes to the law of war, the two professors, is it fundamentally different than domestic criminal law?

Professor SOMIN. Yes, it is.

Professor BROOKS. Yes, it is.

Senator GRAHAM. The purpose of the law of war is to win the war, is to neutralize the enemy, to gather intelligence. The purpose of domestic criminal law is to solve a crime, bring people to justice, giving them a chance to be acquitted or convicted and the purpose of law of war is fundamentally different. Do you agree with that?

Professor BROOKS. Absolutely.

Professor SOMIN. Yes.

Senator GRAHAM. The goal here is to make sure that we know the difference between fighting a war and fighting a crime, and here is the problem for the country. There is, Mr. Bergen, no cupola to conquer. There is no Air Force to shoot down, there is no Navy to sink. We are fighting an ideology that is transforming itself all over the globe.

We need to look at the AUMF anew, we need to broaden the ability to go after the enemy because it is changing day by day. But we need to do so within the values of being an American.

I will end with this thought. Please do not mistake my zeal for defending the country that I do not have values. It was Senator McCain and myself with many others who said do not torture the detainee. When you capture someone, we do not cut off their heads, we give them the lawyer. That makes us better, not weaker.

So count me in for the idea of fighting the war within our values. The reason I do not want to torture anyone is because that is not who we are about and it hurts us more than it helps us.

But having said that, I do understand the difference between fighting a war and fighting a crime, and I will work with my colleagues in any way possible to make sure we make the least amount of mistakes as a nation. But the one mistake I will not tolerate is the mistake of believing we are not at war.

Chairman DURBIN. Senator Lee.

Senator LEE. Thank you, Mr. Chairman, and thanks to all of you for joining us today. I would like to start with Professor Somin.

Professor, in your testimony you note that critics of the administration's white paper on this issue focus on the weaknesses of the three requirements outlined in that white paper that under the memo's analysis must be met before a U.S. citizen may be lawfully targeted in a drone strike.

You argue that because those requirements apply only when the individual is a senior operational leader of Al-Qaeda or of some associated force, the memo's weaknesses might be mitigated or some have argued this anyway.

You state that a senior Al-Qaeda leader likely qualifies as a legitimate target even if he does not pose an imminent threat. But as you also note, the real difficulty lies in determining whether somebody is or is not in fact a terrorist leader.

This puts us in an interesting spot. Our constitutional system requires us I think to accord a degree of due process to a U.S. citizen before that U.S. citizen is deprived of liberty or property or most importantly, life.

Do you tend to agree that it is essential that we have in place some kind of procedures to make sure that people are not deprived of life? In this instance, absent some kind of an adequate procedure that can be used for determining whether somebody is in fact a terrorist leader?

Professor SOMIN. Yes, I do agree and I think that is the central issue that I posed in my testimony and that some of the other witnesses have as well, is that if somebody really is a terrorist leader that is part of a group that is at war with us, then they are a legitimate target, even if they are not an imminent threat, as Professor Brooks said, even if they are sleeping in their bed. Osama

Bin Laden, I think, was asleep when he was targeted. But that did not make it an illegitimate attack.

At the same time, we do need some procedures in place to ensure, particularly in the case of U.S. citizens, that we are in fact choosing the right people. I suggest a FISA-like court is one mechanism that can potentially be used. But also obviously there have to be in place procedures within the executive branch itself to try to minimize the risk of error in this respect.

We cannot unfortunately in war have as much procedure as we would have in ordinary law enforcement. But that does not mean the issue should be just completely left up to the discretion of the President and his subordinates.

Senator LEE. Do you have any indication as to how this administration believes that it should move forward? How it should go about making this kind of determination in a way that accords the appropriate degree of due process?

Professor SOMIN. Some of the other witnesses may be more qualified than I am to speak to that question. I think the difficult issue is that so far the administration has not made public a lot of its procedures. So I join with all the many people who have already at this hearing stated that more publicity on this is desirable, obviously consistent with protecting classified intelligent sources and the like.

Once we know more, we might be in a better position to assess whether the procedures are adequate or not.

Senator LEE. All right. I appreciate that. I want to ask a question that I will give each of you an opportunity to answer. Given the time constraints we face you will have to be a little bit short. But why do we not start at the far end of the table and move back this way?

My question is this. What do you think are the obstacles, the principal obstacles to providing for some kind of independent review, independent judicial review of the executive's determination that a U.S. citizen is a terrorist leader and therefore potentially the subject of a lethal drone strike? We will start with you, General.

General CARTWRIGHT. There are so many scenarios here that you could wander your mind through, but the challenge if you are in a declared area of hostility which is the basis of the questions that Senator Graham was asking, then you have a set of rules even associated with Americans that might be in that population of targetable people.

It would be difficult to stop and have a court case for each one of them. When you are outside of an area of hostility, a declared area of hostility, then I think you have more leeway to have a discussion.

I personally believe having a process on the back side, in other words an accountability process that says okay, we knew going in we had set up some rules. They may not have worked all the time, we may have made errors.

Were errors made in this case? Should the victims, whether they be U.S. citizens or not, have been afforded more rights? Should they be compensated for the loss? What should happen at this stage of the game to address many of the questions like the Yemeni examples that we have heard today, rather than putting a court in

the middle of a war construct, which would I think have some constitutional issues. I defer.

Senator LEE. Thank you. Professor.

Professor BROOKS. Senator, I think that there are no obstacles to creating a more fair and transparent system for ensuring it, certainly with regard to U.S. citizens, that they are not wrongly targeted by their government based on misinformation. I think that all of the reassurances we have heard about the use of remotely piloted aircraft to ensure that we are getting the people we target and not innocent civilians are only as good as our intelligence, and they are only as wise as our strategy.

That said, I think that the biggest political barrier that stands in the way of developing some better mechanism, judicial or otherwise, to ensure that we are targeting the right people based on a reliable process and a fair process and fair rules are that we tend to see this as a very black and white issue. There is war and there is crime and never the two shall meet and they are completely different legal systems with completely different rules.

What we have here right now with globalized terrorism, both with Al-Qaeda and other kinds of groups, some of which are not affiliated with Al-Qaeda, is something that in many ways is like traditional armed conflicts and in many ways is more like large scale organized crime. That is just the reality. It has dimensions of both and requires both military tools at times and also tools that are more traditionally associated with intelligence and law enforcement like disrupting finance and communications.

I think if we can get past that, right now we have a lot of people talking right past each other. We say in a war you can do this and everybody says, well, that is right, and you say, well, if you do not have a war you cannot do that, and everybody says that is right. But then the trouble is, we have a lot of difficulty deciding whether we should apply the war paradigm or the crime paradigm.

Senator LEE. Well certainly you are not disputing that there are some bright lights that go on?

Professor BROOKS. Absolutely.

Senator LEE. Once you are talking about domestic soil, U.S. citizens.

Professor BROOKS. Absolutely, Senator. On the extremes I think we have got a lot of pretty easy issues. It is in the middle that the issues get harder and we need to get more creative about developing hybrid legal mechanisms.

Senator LEE. All right. Mr. Chairman, I just realized I have committed a grave error punishable by death within the Senate which is asking a question that is going to take me well over. Do you want me to rescind that part of the question for the rest of the panel? How do you want me to proceed?

He just said to suspend the death penalty on this circumstance. I appreciate that.

Professor SOMIN. Conscious of the sword of Damocles hanging over my head, I will try to be brief. I think there are two obstacles to ensuring a better system here. One is that we are necessarily relying on intelligence that in some cases is going to be iffy. Second, the review mechanism which I believe should be independent,

must nonetheless act reasonably swiftly. Otherwise we might lose the opportunity to attack a legitimate target.

These are genuine problems but they are not insuperable. We have overcome them to a large extent with the FISA court. Scholars such as Amos Guiora of the University of Utah proposed ways to do it. And as he points out, the government of Israel does in fact have a review mechanism for their targeted killings and it has worked, at least in his view and that of other scholars, reasonably well over the years.

I am not saying we can adopt the exact methods that they use. Obviously their situation and system of government is different from ours. But I think despite the difficulties, we can at least reduce the risk of error and increase the chance of limiting this to legitimate targets without losing the opportunity to attack genuine terrorists who are still out there. Thank you.

Senator LEE. Thank you. Colonel.

Colonel MCSALLY. I do believe the first effort needs to be more transparency in the process that we are using in order to identify somebody as an approved target.

I will say if additional oversight does come in your role that is decided upon, I would encourage that it would be in the area of someone being an approved target, but not in the area of an approval to strike because when you get into that second area, sometimes it is moments, hours, days, weeks, months or even years before the stars line up that we meet all the criteria, we have identified the individual with the right collateral, low civilian casualties in the right geographic location with the right weapon.

If that happens, it has got to be on the front end to name somebody on that target list outside of an area of active combat operations.

Senator LEE. Limited perhaps to the finding that they are a terrorist leader.

Colonel MCSALLY. Then you have to let the targeting process go. It is already painful enough to go up the chain of command to whatever level we have to, sometimes very high in the middle of someone already having been approved. They are already on the list and now you actually have to get additional approval to strike.

Many times you lose the opportunity because too much time goes by and the target is fleeting. So any of that additional oversight needs to be on the front end and outside of our traditional combat operation areas.

Senator LEE. All right. Thank you.

Mr. Bergen.

Mr. BERGEN. I think there would be an advantage as General Cartwright suggests in having a post factor review of CIA strikes. There would be a very concrete thing that could come out of this.

As you know, when the U.S. military inadvertently kills civilians, we pay solatia payments to the victim's family. You can imagine a post factor review of CIA drone strikes where there was civilian casualties. That would allow you to basically make the same kind of payment. After all, if it is a war and there are innocents killed, it does not matter where that takes place.

We as a country have tended to compensate people when we can.

Mr. AL-MUSLIMI. To agree with that point, in the last few years since the strike drones and target killings have been used in Yemen, actually AQAB has been stronger, so it is very hard to think of how this can be actually made any good.

But to make it less bad, I think one of the things that has to be done very fast is issue an apology to the civilians and pay compensation for the civilians' relatives who were killed and more importantly, everywhere where the drone strike has killed civilians I think there has to be at least a sort of compensation to build a hospital or a school in a country that is lacking school or hospital.

Senator LEE. All right. Thank you. Thank you very much. Thank you for your indulgence, Mr. Chairman.

Chairman DURBIN. Thanks, Senator Lee. Mr. Al-Muslimi, do the people of Yemen know that we are there with the approval of the government of Yemen?

Mr. AL-MUSLIMI. It is very hard to speak whether people know or do not know, but whether the government approve or does not approve, it is outside the big fancy walls of the capital, bringing a lot of problems, a lot of blow blacks.

It is not an issue whether the government approves it or not. It is not an issue of sovereignty. It is much as this and the ground, it does not take rocket scientist to figure it out. It has been a problem I think more than it has any good.

Chairman DURBIN. Before the drones, was AQAB viewed as a positive force in Yemen or a negative force?

Mr. AL-MUSLIMI. We have spoke to every Yemeni—I have never met anyone who looks to AQAB as a positive entity ever.

Chairman DURBIN. Thank you. General Cartwright, we have a divided responsibility when it comes to drones, forgive me, Colonel, I am going to continue to use that reference, between the CIA and the military, JSAC.

Aside from the intramural conversation we might have about two different agencies, can you give me your opinion as to whether this is a good thing, a necessary thing, or whether it should be continued?

General CARTWRIGHT. I think Colonel McSally will jump in on this, too. My experience, whether it be drones or other types of weapon systems, when you ask the military to conduct operations that are non-military, we generally have trouble because we train our people to do military operations.

If you ask them to patrol the border, people oftentimes get killed that should not have been shot. If we are going to have the military participate in these types of operations for an extended period of time, more than just a one-off type mission, then we need to go back to some of the practices we probably had in the past associated with reconnaissance where we have specific units designated and equipped and trained and recruited to do that kind of operation and fund it.

If that is what we are going to do, then that is what I would recommend. In other words, if you would like to have just one Air Force rather than two or three for the country for logistics reasons, for training reasons, et cetera, then it needs to be an Air Force that is capable of training a set of people for a specific type of mission that is not the same mission as an area of armed conflict.

Chairman DURBIN. I guess what I am driving at is this. I have been to one of our bases where the drones are launched and I have seen the intelligence gathering taking place. When it is done according to the book, and that is what I was told, it is a very painstaking, elaborate, lengthy evaluation of a site, a person, before the ultimate decision is made. Despite the tragic circumstances where innocent people are killed, and it has happened, every effort is made to avoid that to the extreme, as it should be, as Americans would insist that it be.

I guess the basic question is whether or not the intelligence capacity which is so important in that process is different or better between the CIA and the military. Do you have an opinion?

General CARTWRIGHT. If it is not inside of an area of hostility, it is in a country where we have not declared hostilities, then it is generally accepted that the agency has better intelligence and better ability to gather intelligence than the military does.

That is under the current rules about who does what, where.

Chairman DURBIN. Thank you. Mr. Bergen, one of the things that your New America Foundation has been involved in is some public opinion research about the impact of the drone strikes in Pakistan and Yemen. Could you tell me what you found?

Mr. BERGEN. We did an independent poll in Pakistan's Federal Tribal Area where all these drone strikes happen and we found overwhelming opposition to the drone strikes.

If we asked the question if the Pakistani military was involved, would your opposition change, and the opposition goes down quite a lot if the Pakistani military was more involved. It is an issue of national sovereignty.

We also found overwhelming opposition to Al-Qaeda and the Taliban and we asked the question if the Al-Qaeda or the Taliban were on the ballot, would you vote for them in an election and the answer was only 1 percent would.

There has not been to my knowledge really good polling in Yemen on this issue. There is some public discontent, but it is nothing as far as I can tell anything on the scale of what it is in Pakistan, where it is really more about in my view the sovereignty issues than the civilian casualty issues.

After all, their parliament in April voted to basically stop this. So you have got this very kind of confusing situation where the parliament has voted against this, yet it still proceeds. They have F-16s which could theoretically shoot these drones down but do not. So there is some sort of passive but tacit consent.

Chairman DURBIN. That is exactly the point I want to go to with Professor Brooks and Somin with my last question.

What I find different here is this definition of battlefield. I knew what we were voting for in 2001 when it came to Afghanistan. We were headed there, that is where Al-Qaeda was and they had just attacked the United States and we were going to answer that attack.

I did not realize as I said and I do not think many Members did, that we would be having this conversation 12 years later about Yemen, Somalia, even Pakistan. Maybe I should have been able to discern that, but I did not. Maybe some did.

It appears now that we at least have to have tacit, passive, if not active approval before we are using these aircraft, these unmanned aerial aircraft before we engage the enemy.

I take it the enemy is a lot of other places that we are not pursuing them. How does this work into this definition of battlefield and the Authorization for Use of Military Force?

Professor BROOKS. Not very comfortably frankly, and that is why I emphasize that the deep problem is that we have got two legal paradigms that just do not fit the challenges we are faced with right now.

To illustrate, you may remember, Senator, in 1976, Orlando Letelier, the former Chilean defense minister, who had been ousted in a military coup on Chile and imprisoned and tortured, who ultimately came to the United States and was outspoken against the Chilean military dictatorship.

The Chilean military decided in the context of an ongoing insurgency in Chile that they did not like that very much and so Chilean intelligence operatives planted a car bomb in his car here in Washington, DC, killing him and his American citizen assistant, Ronni Moffit.

Our government at the time called that murder, called that extrajudicial homicide. My concern right now is that we have, because of the gap between these two legal paradigms and the extreme secrecy and lack of transparency in which these decisions take place, right now if we could imagine that those circumstances occurred today, I would assume that the Chilean military government were it still extant would be saying to the United States, what is your objection?

He is an enemy of the Chilean state, you were unwilling or unable to do anything about it. We asked you, you harbored him, and so we had to take matters into our own hands. If we said, well, we questioned your assessment that he was a combatant or that there is an armed conflict, they would reasonably reply, that is our decision to make and we do not have to tell you the basis on which we made it or anything else.

My concern, my broad rule of law concern here is that we have essentially handed a playbook for abuse to oppressive governments around the world. We need to develop some middle ground that acknowledges that we are in a situation that is war-like in many ways but crime-like in other ways. I think we can do that. I think that is just a question of creativity.

One final comment, if I may. It really goes to the strategic issue. When it comes to the strategic costs and benefits of this policy, unfortunately perceptions matter as much as reality, so while I very much agree with my colleagues that drones do not present novel legal issues, the reality is, as my colleagues have also suggested, the blowback is real.

When we are taking into account the strategic costs, I think that is something unfortunately we have to consider just as much as the legal issues.

Professor SOMIN. Just briefly on this issue. The AUMF as written actually does not contain a geographic limitation. Rather the limitation is based on the nations, organizations, or persons that the President determines planned, authorized, committed, or aided the

terrorist attacks that occurred on September 11. So it is not limited to Afghanistan or any other particular nation.

It allows the President to attack these groups or individuals wherever they might be located. But as I said earlier, there is an important distinction between nations where the government either supports these groups or is unwilling or unable to do anything about them and nations where there is some reasonable rule of law.

I think both legally and from a policy perspective, different measures are appropriate in different places. And obviously I entirely second what others have said that there might be cases where it is legally or even morally appropriate to use lethal force, but we might not want to do so out of policy considerations, whether blowback or other types of concerns.

But the AUMF as such does not have a geographic constraint.

Chairman DURBIN. I think many of us viewed that in terms of hot pursuit as opposed to a 12-year effort in far flung places where Al-Qaeda's progeny would somehow appear. It was a little different time and place after 9/11 and now we are looking back at it from a different perspective.

Senator Cruz.

Senator CRUZ. Thank you, Mr. Chairman. I would like to first ask a question of General Cartwright and Colonel McSally.

For counterterrorism purposes, what is the relative value of killing versus capturing a senior operational leader of Al-Qaeda and how is that assessed?

General CARTWRIGHT. Again, I have to sit in the hypothetical here, but there is a progression of a terrorist organization generally looked at in three stages. One is recruiting and then you have an iconic figure. In that particular phase, eliminating that figure eliminates the movement.

When you move into the second stage, it is generally considered, that is where you start to build a bench so to speak and if you kill one, another will come behind. In the third stage it is called franchising. They start to proliferate out and they have their own ability to generate.

After you leave the first stage, separate political considerations, killing the leader has little value because he or she will be replaced. You may get a particularly capable one and it takes them awhile to recover, but generally it is considered in second and third stages killing the leaders does not really eliminate the movement.

Chairman DURBIN. Colonel.

Colonel MCSALLY. Sure. I will speak a little bit to the challenges if you do choose a capture mission over a kill mission as well. But it really does depend on the individual, the circumstances, and the location whether it is more desirable to kill or capture.

But let us just say we are agreeing maybe you want to capture in more circumstances, then it does depend on the country we are talking about and the location. It goes back to the, is there consent or are they unwilling and unable or are you going to tip them off when you make that call?

Let us say you then still decide we do need to do this capture mission. That can be a very complex operation. You are talking about bringing in special forces. As I mentioned, sometimes the in-

telligence pops at a moment's notice, so you could have them sitting at a base or offshore on a ship waiting for weeks or months unable to do other missions, waiting for the intelligence to come together.

Then if you order them in, they may have to fight their way in and fight their way out, so there could be some extraordinary civilian casualties associated even with that mission if things go wrong.

Then of course the reality that you then have the potential for U.S. casualties or U.S. individuals to then be captured and the strategic implications of that. So those are all the things that are weighed when you are considering even if you desire to do a capture mission, sometimes the bar is way too high and the risk is way too high and the cost is way too high both in time and opportunity costs for those particular special capabilities to do the capture.

Senator CRUZ. Thank you. Mr. Bergen, how has in your opinion the Obama administration focused on targeted killings affected our ability to gather intelligence and analyze situations in the Middle East such as in Libya or Egypt?

Mr. BERGEN. I think it is a very hard question to answer, sir, but I will make the factual observation that it was hard to predict the Egyptian revolution. Even the people involved did not know there was going to be a successful revolution.

But the CIA did seem to have missed the fact that a quarter of the seats in parliament were taken by the Salafists who are now the second largest party in Egypt.

At the end of the day, the CIA should be in the business of strategic warning to policymakers. That is ultimately what it should be doing.

If it is the assessment of you and your colleagues that the CIA mission has been sort of deformed by the fact that it has become more a paramilitary organization, I think that is a problem.

Senator CRUZ. Thank you. Now a question for Professor Somin.

Do you see any tension between the Obama administration's position that U.S. citizens who are captured aiding Al-Qaeda must be tried in Article III courts instead of military commissions but that nonetheless they can be summarily killed with drone strikes?

Does that strike you as at all inconsistent?

Professor SOMIN. I do not think it is inherently inconsistent in that when we capture somebody, if we consider somebody as an enemy combatant and if they really are a legitimate enemy combatant, then they can certainly be targeted.

Once they are captured as an enemy combatant, I think the administration could choose as a matter of policy to try these individuals in Article III courts as opposed to doing so in military courts though I do not think it would necessarily be unconstitutional or illegal to go the military court route.

I guess I would say that there is not an inherent contradiction unless the administration says not only that we are just choosing as a matter of policy to try certain enemy combatants in Article III courts, but actually claiming that it is never permissible to try such individuals in military courts which I think would probably not be correct.

Senator CRUZ. Would you agree that on any analysis it is a greater potential violation of someone's rights to take their life than it is to capture and interrogate them?

Professor SOMIN. In many cases I think that is true. But I do not think it is true categorically in that there could be a person who is a legitimate target and therefore can be killed on a battlefield, but if captured there are still legal limits on the methods we can use to interrogate them. For instance, we should not be able to engage in torture which is illegal under domestic and international law.

Senator CRUZ. All right. Let me ask a question of Professor Somin and Professor Brooks. There has been some considerable discussion about the potential role of a FISA-like court dealing with either designating individuals as terrorist leaders or having some role in drone strikes.

It strikes me that Senator Graham raised serious constitutional questions about the Article II role of the Commander in Chief and the appropriate ability of this Congress to restrict the decisions of the Commander in Chief directing military operations against foreign hostile forces.

I would be interested in both of your assessments of those constitutional concerns and the right boundaries that would respect those constitutional concerns.

Professor SOMIN. Certainly. I think everybody or almost everybody would agree that the President has important powers as Commander in Chief. At the same time, Congress has the authority under Article I to make rules for the government and regulation of the land and naval forces which I think includes the President when he is acting in his role as Commander in Chief.

For instance, Congress does things like restrict the kind of weapons that can be used in a battlefield. It restricts the treatment of prisoners when they are captured and so forth. And therefore I think it is also permissible for Congress to require a certain amount of process before certain kinds of operations occur.

I think Article I gives Congress that authority just as it gives it the authority to make the other kinds of regulations that I noted. Obviously the fact that Congress has authority does not mean that Congress should always exercise it to its fullest extent. Various scholars and others have talked about how to strike the right balance of independent review and how that should be done.

Professor BROOKS. Senator, Congress also of course has the power to define and punish offenses against the laws of nations and that would also be a useful mechanism in this regard.

The only thing I would add, though, is that it is a sort of "who guards the guardians" problem here. Clearly we all agree that if there were to be some future President who was, say, insane and who simply asserted that there was a war against some perfectly innocent group of people and that that justified the use of lethal force, we would wish there to be some mechanism short of impeachment to try to restrain that abuse of power.

I think the question is—I do not think that the Commander in Chief power and the fact that the President obviously has a great deal of discretion when it comes to armed conflicts and foreign policy issues needs to necessarily restrain Congress from all oversight.

I think that you can certainly design a court, particularly if you focus on the after-the-fact review rather than the advance approval of targeting. I think you could certainly with relative ease devise a judicial process that would not pose any of those problems.

Professor Somin mentioned earlier, and I think it is very instructive and worth reading for anyone who has not had the time to take a look at, the Israeli Supreme Court's 2006 decision on targeted killings. It is a very similar legal system in many ways and obviously the challenges they face domestically with regard to terrorism are far greater than those we face, luckily for us, but that court resoundingly rejected the notion that these decisions were the question of whether a particular body of law applies in the first place to a particular body of facts, that is precisely the kind of decision that the judiciary and only the judiciary is normally considered to be qualified to make.

Senator CRUZ. I would like to thank each of the six of you for very illuminating and insightful testimony and I would like to thank in particular Mr. Al-Muslimi for traveling a considerable distance of time and for presenting heartfelt and quite powerful testimony. I thank the Chairman for conducting this hearing.

Chairman DURBIN. Thank you, Senator.

Senator Lee.

Senator LEE. Thank you very much. I just want to follow up on one issue with Professor Somin. You note that some have proposed developing an oversight court, something modeled after the FISA court, for example, that would be tasked with the responsibility of reviewing the executive's determination about a U.S. citizen being a terrorist leader.

Some naturally worry that such confidential courts operate without any kind of transparency, any kind of review so that much of what they do would be completely immune from any oversight from the public, from any kind of scrutiny.

At the same time, others would argue that it necessarily makes a certain degree of sense to do that where you are dealing with so sensitive a determination as to whether or not a particular U.S. citizen is in fact a terrorist leader.

I guess my question is if Congress were to agree with the recommendation to create such a court, a FISA-like court, how would you recommend that it go about the very delicate task of balancing on the one hand the need for a degree of confidentiality and on the other hand the need for the public to be able to understand what is happening on some level?

Is there a way that you could perhaps separate those two out so that you could make them both harmonize?

Professor SOMIN. I think it is a very important question. There may not be a way to find a perfect ideal balance. But there are actually many situations already in the legal system where national security information or evidence that may impinge on somebody's privacy is held in camera by the court and is not publicized. But at the same time the court's legal reasoning can be publicized both for review by higher courts and also for consideration by the public and outside experts.

So it seems to me that while particular details of factual information or intelligence data can be held confidential, the court's legal

reasoning does not have to be. Also the general standards that the court uses for approving or rejecting such requests can be made public, at least to a large extent.

We do have experience with this with the FISA court, and with other cases dealing with other national security information. As Professor Brooks has noted, and I note it in my testimony, there is the experience of Israel in this regard as well. So we have a lot of models that we can potentially use to at least reduce this tension even if we cannot totally eliminate it.

Senator LEE. Even if that means possibly bifurcating the proceedings or making some aspects of the determination public and others immune from any kind of transparency?

Professor SOMIN. Yes, that is correct. We cannot have perfect transparency. But this system would still have at least somewhat more transparency than the current situation where these decisions are made almost entirely within the executive branch, often with no transparency at all.

When it comes to transparency, I think the best should not be the enemy of the good.

Senator LEE. Thank you very much. Thank you, Mr. Chairman.

Chairman DURBIN. Thank you, Senator Lee, and thank you Senator Cruz and a special thanks to this panel for your patience and Mr. Al-Muslimi, thank you for your personal sacrifice in coming. Your testimony was extremely important to this hearing and we thank you so much for coming here today. Thanks to Mr. Bergen, Colonel McSally, Professor Somin, Professor Brooks and General Cartwright. Thank you very much for this.

This was a long-anticipated hearing and the first of its kind in the Senate and I am sure not the last. There will be more that is going to be discussed.

A number of groups have submitted testimony that will be added to the record without objection, including the American Civil Liberties Union and the Standard National, the Constitution Project, Human Rights First, Human Rights Watch, and the Open Society Foundations. Without objection, I will enter their statements in the record.

[The information referred to appears as submissions for the record.]

Chairman DURBIN. Then I want to take a point of personal privilege here to acknowledge a person in the audience. Hayne Yoon who is sitting in the second row here. She is currently a Deputy Federal Public Defender in Los Angeles, but she returned for this hearing because for the last 2 years she has been on detail to my office and served as counsel on this Constitution Subcommittee.

Before she left, she helped to prepare today's hearing. I hope we did well based on your standards and what you have asked us to consider. She has made many important contributions to our work, including improving coordination by Federal, State, and local law enforcement in apprehending international fugitives and planning the first ever congressional hearings on solitary confinement and the school-to-prison pipeline which were hearings we had previously.

Hayne, thanks so much for your fine work.

The hearing record will be held open for 1 week to accept additional statements. Written questions for the witnesses might also be submitted. I ask that they be submitted by the close of business 1 week from today. We will ask the witnesses to respond in a prompt fashion.

If there are no further comments from the panel or from my colleagues, I thank the witnesses for attending and my colleagues for their participation and the hearing stands adjourned.

[Whereupon, at 6:23 p.m., the Subcommittee was adjourned.]

[Additional material submitted for the record follows.]

A P P E N D I X

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

Witness List

Hearing before the
Senate Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights and Human Rights

On

“Drone Wars: The Constitutional and Counterterrorism Implications of Targeted Killing”

Tuesday, April 23, 2013
Hart Senate Office Building, Room 216
4:00 p.m.

General James Cartwright
United States Marine Corps (Ret.)
Washington, DC

Rosa Brooks
Professor of Law
Georgetown University Law Center
Washington, DC

Ilya Somin
Professor of Law
George Mason University School of Law
Arlington, VA

Colonel Martha McSally
United States Air Force (Ret.)
Tucson, AZ

Peter Bergen
Director
National Security Studies Program
New America Foundation
Washington, DC

Farea Al-Muslimi
Sana'a, Yemen

CONSTITUTIONAL AND COUNTER TERRORISM
IMPLICATIONS OF TARGETED KILLING

General (ret) James E. Cartwright

Testimony to the Senate Judiciary Subcommittee on the
Constitution, Civil Rights, and Human Rights

23 April 2013

Introduction

Senator Durbin, Senator Cruz and other distinguished members. It's an honor and a pleasure to present testimony before this committee. Thank you for inviting me. Much of my testimony will be based on my 40 years of military experience and work I am currently supporting with various universities, think tanks and studies. My time in government is dated, retiring in 2011.

The Threat

In today's world we are dealing with individuals and groups that have the potential to exercise lethal operations, which in the past were only available to nation states. These terrorist groups have access through our networked environment to intellectual capital, resources and communication venues enabling them to cause great harm. They find sanctuary in sympathetic populations, ungoverned spaces, and have the potential to move quietly, often undetected, across the globe. Our ability to discover, disrupt, and deny their operations has improved as nations cooperate, exchange information and develop technologies to deny them of the resources, mobility and target access. Yet they adapt and persist with no current predictions, I am aware of, that see this threat diminishing any time soon. Today's hearing focuses on one of our counter terrorism tactics and the technology that supports it, targeted killing and the use of armed drones.

Targeted Killing

The methods of locating these groups and individuals, who have a past or current behavior that identify them as a threat, is difficult. Our intelligence services have significantly improved their tradecraft in this counter terrorism arena, but it is a daunting, time consuming task. The authorities, policies, laws, accountability chains, and means that have served us in the past are challenged by willingness of governments to support operations against these groups. Their concerns over collateral damage, violations of sovereignty, their role in authorizing operations, and the perception that the threat may not be relevant to the host nation, add to the challenges. In addition, determining who in the population is actually participating in planning, support and operations is often

difficult. As a result, the scale of operations and extended presence in an area can take on the character of military operations, absent the declaration of an area of hostility.

Armed Drones

Advances in high band-width satellite communications, sensing technologies - particularly full motion video - combined with existing aircraft technology has allowed armed drones to emerge as the platform of choice in this counter terror mission space. In military operations, these drones are highly capable and sought after by ground forces. They cost roughly \$4-5M versus a modern fighter's \$150M. They persist on station for 15-20 hours without refueling, versus 1-2 hours for fighter attack aircraft. They consume 100 gallons of fuel per flight versus 1,000-3,000 gallons for an unrefueled fighter attack aircraft. Their optics provides full motion imagery at far greater distances and altitudes than the human eye, and the crews are not distracted or disabled by the constant duties of flight. Their sensor information can be distributed to fixed and mobile users in real time. For a Marine, this means getting up in the morning, getting a patrol assignment, monitoring the target area in real time, while conducting mission planning, followed by travel to the target area, execution of the mission, return to base and debriefing. They can rerun the entire mission for accurate debriefings and mission effectiveness and accountability. During all that, they have an armed escort that can see over hills, and around corners, in the palm of their hand. Not hard to see why military operations are significantly improved by this technology.

Drones offer many advantages over other conventional forces in counter terrorism missions. Basing can be located far from the area of interest without sacrificing time on station. They have far greater mobility than a similar ground or naval capability. Their elevated sensors are generally more effective in locating and pursuing a threat. They can persist in an area for extended periods of time awaiting emergence or a clear opportunity. They can quickly adapt to fixed and mobile targets. These and many other attributes of armed drones make them the leading choice in counter terrorism operations.

DOD – Oversight & Accountability

The use of armed platforms and drone technology has been a part of DOD policies and law for many years. Remoting the crew to bases, where they have access to greater information tools, over-sight mechanisms and accountability, have improved the application of force when required. The ability to control and employ drones in conjunction with or by mobile users has had the same positive attributes. Authority to train, equip, and support, rests with the military departments and Services. Operations are conducted by Combatant Commanders through the National Command Authority exercised by the President and the Secretary of Defense. The preparation, movement, and operations, along with the definition of what forces, what capabilities, what actions and objectives, are stipulated in writing. There is a clear line of authority and accountability. Congress provides oversight as appropriate in all of these areas.

Considerations for Oversight & Accountability for Drone Technologies

Legitimate questions remain about the use, authorities, and oversight of armed drone activities outside an area of declared hostility. While I believe, based on my experience, all parties involved in this activity have acted in the best interests of the country, as with other new technologies, adaptation of policy and law tends to lag implementation of the capability. We should now ask; are the use, authority and oversight protocols actually providing us with the safeguards we want? Are the current metrics telling the full story of operational effectiveness? Do these same metrics serve to warn us when operations are no longer contributing to the desired end-state?

I have spent time supporting reviews of drone use outside an area of declared hostility, with think tanks, NGOs, and law schools. One of the more thoughtful and useable products I have seen is the work done by Columbia Law School, Center for Civilians in Conflict. They conducted a human rights clinic last year that provided a menu of review actions that would serve to focus on what in our use, authorities and oversight protocols is working and what may require revision or new measures. I also believe, based on my experience, that this list of actions has, in large measure, been accomplished. Because of the sensitive nature of these counter terror operations the extent to which review results have been made public or shared across government is likely uneven. I provide the following recommended actions from the clinic, for the committee's consideration.

To the Administration

» Establish a special interagency task force to evaluate covert drone operations and make recommendations to the President with regard to the following issues:

- The extent of civilian casualties from drone strikes and the larger impact on civilian communities, including destruction of homes and displacement, and retaliatory violence by local groups;
- The sufficiency of civilian protection mechanisms employed by the CIA and JSOC, including civilian casualty mitigation processes;
- The adequacy of civilian protection standards for the identification of targets, including the reliability of "signatures," and the sufficiency of intelligence sources and analysis where there is limited US ground presence;
- The capabilities and limitations of drone technology for reducing and accurately assessing civilian harm, and the adequacy of current technology testing and personnel training;
- The existence and sufficiency of post-strike assessments and investigations of who is killed, including assessing the appropriateness of the behaviors associated with signature strikes;

- The existence and sufficiency of processes for recognizing harm and making amends to civilian victims of drone strikes, their families, and communities;
- The strategic value and humanitarian impact of covert drone strikes compared to other counter terrorism approaches;
- For joint CIA-JSOC operations, the adequacy of oversight mechanisms, the delineation of responsibilities between the organizations, and the adequacy of agency accountability for civilian protection and harm response.

The task force should be composed of representatives from relevant agencies and departments including the Director of National Intelligence, the State Department, the Department of Justice, the National Security Agency, the Department of Defense, and the Central Intelligence Agency. A declassified version of the task force's findings should be made publicly available.

- » Continue to engage with civil society regarding legal standards for targeting operations.
- » Identify the international law-related justifications and standards that apply to covert drone strike operations in different countries, including the legal standards for who may be targeted.
- » Encourage the Department of Defense and the CIA to establish or implement processes for declassifying information about targeting operations once they are completed.

To the CIA

- » Acknowledge that the CIA has a role in drone strikes outside of Afghanistan; establish a process for declassifying information about CIA targeting operations once they are completed, and officially provide information on the impact of the program on civilians, including to the relevant US Congress committees and members.
- » Publicly describe the agency's civilian protection mechanisms, including its civilian casualty mitigation processes and post-strike investigatory procedures.
- » Engage with civil society regarding legal standards for targeting operations; confirm whether the agency regards itself as bound by international law, including under which specific legal framework it is operating the drones program (human rights law, international humanitarian law, etc.), and publicly describe the agency's legal standards for who may be targeted.
- » Disclose steps the agency takes to train personnel involved in drone operations, including lawyers, on applicable laws and related civilian protection and harm response tactics and procedures. www.civiliansinconflict.org

To the Department of Defense, SOCOM and Joint Special Operations Command (JSOC)

- » Acknowledge that JSOC has a role in drone strikes outside of Afghanistan; in accordance with existing Department of Defense processes for declassifying information on operations, declassify information on drone targeting operations once they are completed; and officially provide information on the impact of operations on civilians, as is done by the military in traditional combat theaters.
- » Publicly describe the agency's civilian protection mechanisms, including its civilian casualty mitigation processes and post-strike investigatory procedures.
- » Clarify whether directives, rules, and manuals in relation to civilian protection and use of force compliance that are a matter of Department of Defense-wide policy also apply to JSOC operations, including operations conducted under the CIA statutory authority.

To Congress

- » Exercise oversight powers to the fullest extent possible in reviewing and evaluating the following issues:
 - The extent of civilian casualties from covert drone strikes and the larger impact on civilian communities, including destruction of homes and displacement, and retaliatory violence by local groups;
 - The sufficiency of civilian protection mechanisms employed by the CIA and JSOC, including civilian casualty mitigation processes;
 - The adequacy of standards for the identification of targets, including the reliability of "signatures," and the sufficiency of intelligence sources and analysis where there is limited US ground presence;
 - The capabilities and limitations of drone technology for reducing civilian harm, and the adequacy of current technology testing and personnel training;
 - The existence and sufficiency of post-strike assessments and investigations that determine who is killed, including the characterization of military-age males as presumptively non-civilian;
 - The existence and sufficiency of processes for recognizing harm and making amends to civilian victims of covert drone strikes, their families, and communities;
 - The strategic value and humanitarian impact of covert drone strikes compared to alternative approaches to counterterrorism;

- For joint CIA-JSOC operations, the adequacy of oversight mechanisms; the delineation of responsibilities between the organizations, and the adequacy of agency accountability for civilian protection and harm response.
- » Seek information about the impact of covert drone strikes from sources outside of government, including journalists, regional experts, and civil society.
- » Exercise effective oversight of joint CIA-JSOC operations, e.g., by formally requiring that joint operations be reported to both intelligence oversight committees, and the Senate and House Armed Services Committees.
- » Inform public debate about the involvement of the CIA and JSOC in drone strikes, effectiveness of the strikes in counterterrorism operations (including in the long-term), and civilian impact, e.g., through an open congressional hearing.

The full report is available at:

<http://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/The%20Civilian%20Impact%20of%20Drones.pdf>

The Constitutional and Counterterrorism Implications of Targeted Killing

**Testimony Before the Senate Judiciary Subcommittee on the
Constitution, Civil Rights, and Human Rights**

April 23, 2013

Statement for the Record Submitted By

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Chairman Durbin, Ranking Member Cruz, members and staff of the subcommittee, thank you for giving me the opportunity to testify today about the constitutional and counterterrorism implications of U.S. drone wars and targeted killing policy. I appreciate your commitment to fostering a rigorous and transparent dialogue on this tough issue.

I am currently a Professor of Law at Georgetown University Law Center, where I teach courses on international law, constitutional law and national security issues. I am also a Bernard L. Schwartz Senior Fellow at the New America Foundation, and I write a weekly column for *Foreign Policy* magazine. From April 2009 to July 2011, during a public service leave of absence from Georgetown, I had the privilege of serving as Counselor to the Undersecretary of Defense for Policy at the Department of Defense. This testimony reflects my personal views only, however.

Mr. Chairman, the mere mention of drones tends to arouse strong emotional reactions on both sides of the political spectrum, and last week's tragic events in Boston have raised the temperature still further. Some demonize drones, denouncing them for causing civilian deaths or enabling long-distance, "video game-like" killing, even as they ignore the fact that the same (or worse) could equally be said of many other weapons delivery systems. Others glorify drones, viewing them as a low- or no-cost way to "take out terrorists" wherever they may be found, with little regard for broader questions of strategy or the rule of law.

I believe it is important to take a closer look both at what is and what *isn't* new and noteworthy about drone technologies and the activities they enable. Ultimately, "drones" *as such* present us with few new issues—but the manner in which the United States has been using drone strikes raises serious questions about their strategic efficacy and unintended consequences. Just as troubling -- particularly with regard to this subcommittee's mandate -- the legal theories used by the Obama Administration to justify many US drone strikes risk undermining the rule of law.

It does not have to be this way, however. I believe that the President and Congress can and should take action to place US targeted killing policy on firmer legal ground, and at the end of this testimony I will offer some suggestions for how this might be accomplished.

In the first part of this testimony, I will first address some of the most common but *unfounded* criticisms of US drone strikes. In the second section, I will discuss some of the perceived *advantages* of drones, focusing on the ways in which drone technologies lower the cost of using lethal force across borders. In the third section, I will highlight some of the strategic costs of current US drone policy. In the fourth section, I will first discuss the concept of the rule of law and the legal framework in which US drone strikes occur, then look specifically at the law of armed conflict and finally at the international law of self-defense, highlighting the ways in which existing legal frameworks offer only ambiguous guidance with regard to the legality of US targeted killings. In the fifth section, I will briefly address the question of what precedent US targeted killing policy is setting for other nations. In the sixth and final section, I will turn to the question of reform. While it is beyond the scope of this testimony to fully examine the many possible routes to improving oversight and accountability, I will briefly highlight a number of possible ways for Congress to ensure that US targeted killing policy does not undermine rule of law norms.

1. What's *not* wrong with drones

Many of the most frequently heard criticisms of drones and drone warfare do not hold up well under serious scrutiny – or, at any rate, there's nothing uniquely different or worse about drones, compared to other military technologies. Consider the most common anti-drone arguments.

First, critics often assert that US drone strikes are morally wrong because they kill innocent civilians. This is undoubtedly both true and tragic -- but it is not really an argument against drone strikes as such. *War* kills innocent civilians, period. But the best available evidence suggests that US drone strikes kill civilians at no higher a rate, and almost certainly at a lower rate, than most other common means of warfare.

Much of the time, the use of drones actually permits far greater precision in targeting than most traditional manned aircraft. Today's unmanned aerial vehicles (UAVs) can carry very small bombs that do less widespread damage, and UAVs have no human pilot whose fatigue might limit flight time. Their low profile and relative fuel efficiency combines with this to permit them to spend more time on target than any manned aircraft. Equipped with imaging technologies that enable operators even thousands of miles away to see details as fine as individual faces, modern drone technologies allow their operators to distinguish between civilians and combatants far *more* effectively than most other weapons systems.

That does not mean civilians never get killed in drone strikes. Inevitably, they do, although the covert nature of most US strikes and the contested environment in which they occur

makes it impossible to get precise data on civilian deaths. This lack of transparency inevitably fuels rumors and misinformation. However, several credible organizations have sought to track and analyze deaths due to US drone strikes. The British Bureau of Investigative Journalism analyzed examined reports by "government, military and intelligence officials, and by credible media, academic and other sources," for instance, and came up with a range, suggesting that the 344 known drone strikes in Pakistan between 2004 and 2012 killed between 2,562 and 3,325 people, of whom between 474 and 881 were likely civilians.¹ (The numbers for Yemen and Somalia are more difficult to obtain.) The New America Foundation, with which I am affiliated, came up with slightly lower numbers, estimating that US drone strikes killed somewhere between 1,873 and 3,171 people overall in Pakistan, of whom between 282 and 459 were civilians.²

Whether drones strikes cause "a lot" or "relatively few" civilian casualties depends what we regard as the right point of comparison. Should we compare the civilian deaths caused by drone strikes to the civilian deaths caused by large-scale armed conflicts? One study by the International Committee for the Red Cross found that on average, 10 civilians died for every combatant killed during the armed conflicts of the 20th century.³ For the Iraq War, estimates vary widely; different studies place the ratio of civilian deaths to combatant deaths anywhere between 10 to 1 and 2 to 1.⁴

The most meaningful point of comparison for drones is probably manned aircraft. It's extraordinarily difficult to get solid numbers here, but one analysis published in the *Small Wars Journal* suggested that in 2007 the ratio of civilian to combatant deaths due to coalition air attacks in Afghanistan may have been as high as 15 to 1.⁵ More recent UN figures suggest a far lower rate, with as few as one civilian killed for every ten airstrikes in Afghanistan.⁶ But drone strikes have also gotten far less lethal for civilians in the last few years: the New America Foundation concludes that only three to nine civilians were killed during 72 U.S. drone strikes in Pakistan in 2011, and the 2012 numbers were also low.⁷ In part, this is due to technological advances over the last decade, but it's also due to far more stringent rules for when drones can release weapons.

Few details are known about the precise targeting procedures followed by either US armed forces or the Central Intelligence Agency with regard to drone strikes. The Obama Administration is reportedly finalizing a targeted killing "playbook,"⁸ outlining in great detail the procedures and substantive criteria to be applied. I believe an unclassified version of this should be made public, as it may help to diminish concerns reckless or negligent targeting

¹ See <http://www.thebureauinvestigates.com/category/projects/drones/>

² <http://counterterrorism.newamerica.net/drones>

³ See http://www.nytimes.com/2010/10/23/world/middleeast/23casualties.html?_r=3 ; www.icrc.org/eng/assets/files/other/irrc-872-wenger-mason.pdf

⁴ See http://en.wikipedia.org/wiki/Casualties_of_the_Iraq_War

⁵ See <http://smallwarsjournal.com/jml/art/close-air-support-and-civilian-casualties-in-afghanistan>

⁶ See <http://www.navytimes.com/article/20130219/NEWS/302190304/U-N-Afghan-civilian-deaths-in-airstrikes-down>;
<http://unama.unmissions.org/Default.aspx?tabid=12254&ctl=Details&mid=15756&ItemID=36445&language=en-US>

⁷ See <http://counterterrorism.newamerica.net/drones>

⁸ See http://articles.washingtonpost.com/2012-10-24/world/35499428_1_drone-strikes-brennan-obama-administration;
<http://www.usnews.com/debate-club/has-obama-gone-too-far-with-his-drone-policies/brennan-and-obamas-drone-playbook-must-be-debated-publicly>

decisions. Even in the absence of specific details, however, I believe we can have confidence in the commitment of both military and intelligence personnel to avoiding civilian casualties to the greatest extent possible. The Obama Administration has stated that it regards both the military and the CIA as bound by the law of war when force is used for the purpose of targeted killing.⁹ (I will discuss the applicable law of war principles in section IV of this statement). What is more, the military is bound by the Uniform Code of Military Justice.

Concern about civilian casualties is appropriate, and our targeting decisions, however thoughtfully made, are only as good as our intelligence—and only as wise as our overall strategy. Nevertheless, there is no evidence supporting the view that drone strikes cause disproportionate civilian casualties relative to other commonly used means or methods of warfare. On the contrary, the evidence suggests that if the number of civilian casualties is our metric, drone strikes do a better job of discriminating between civilians and combatants than close air support or other tactics that receive less attention.

Critics of US drone policy also decry the fact that drones enable US personnel to kill from a safe distance, which seems to be viewed as somehow “unsavory.” But long-distance killing” is neither something to automatically condemn nor something unique to drone technologies. Military commanders naturally seek ways to kill enemies without risking the lives of our own troops – and if drone technologies enable us to reduce the danger to our own personnel, all things being equal this is surely a good thing, not a bad thing. No one would argue that we should strip troops of body armor just to level the playing field.

It is also important to consider drone strikes in the context of the evolution of warfare. After all, drones are hardly the only technology that has facilitated killing from a distance. In this sense, drones don't present any “new” issues not already presented by aerial bombing -- or by guns or bows and arrows, for that matter. The crossbow and later the long bow were considered immoral in their day. In 1139, the Second Lateran Council of Pope Innocent II is said to have “prohibit[ed] under anathema that murderous art of crossbowmen and archers, which is hateful to God.”¹⁰ In the early 1600s, Cervantes took a similar view of artillery, which he called a “devilish invention” allowing “a base cowardly hand to take the life of the bravest gentleman,” with bullets coming --like drones-- “nobody knows how or from whence.”¹¹

Other critics have decried what they called “the PlayStation mentality” created by drone technologies. I cannot see, however, that drones any more “video game-like” than, say, having cameras in the noses of cruise missiles. Regardless, there's little evidence that drone technologies “reduce” their operators' awareness of human suffering. If anything, drone operators may be far more keenly aware of the suffering they help inflict than any sniper or bomber pilot could be, precisely because the technology enables such clear visual monitoring. Increasingly, there is evidence that drone pilots, just like combat troops, can suffer from post-traumatic stress disorder.

⁹ See http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf

¹⁰ See <http://www.ewtn.com/library/COUNCILS/LATERAN2.HTM>

¹¹ See JFC Fuller, *Armament and History: The Influence of Armament on History from the Dawn of Classical Warfare to the End of the Second World War*, 1998, at <http://books.google.com/books?id=hECRavhisUIC&pg=PA91&lpg=PA91&dq=cervantes+artillery+base+devilish&source=bl&ots=ZlFDfmgJuh&sig=2E4lVzuBqOREKoVokbnfUpRG3fs&hl=en> “v=onpage&q=cervantes%20artillery%20base%20devilish&f=false”

A recent Air Force study found that 29 percent of drone pilots suffered from "burnout," with 17 percent "clinically distressed."¹²

2. The perceived advantages of drone strikes

For every critic who demonizes drones while ignoring their similarities to other less-demonized technologies, there are as many others who seem to regard drones as a near-panacea – an almost magical new technology that will allow us to economically stave off foreign threats from the comfort and safety of home – or even, perhaps, find some new “fix” to the thorny problems posed by “homegrown” attacks such as those on the Boston Marathon.

But the advantages of drones are as overstated and misunderstood as the problems they pose—and in some ways, their very perceived advantages cause new problems. Drone technologies temptingly lower or disguise the costs of lethal force, but their availability can blind us to the potentially dangerous longer-term costs and consequences of our strategic choices.

Armed drones lower the perceived costs of using lethal force in at least three ways. First, drones reduce the dollar cost of using lethal force inside foreign countries.¹³ Most drones are economical compared with the available alternatives.¹⁴ Manned aircraft, for instance, are quite expensive:¹⁵ Lockheed Martin's F-22 fighter jets cost about \$150 million each; F-35s are \$90 million; and F-16s are \$55 million. But the 2011 price of a Reaper drone was approximately \$28.4 million, while Predator drones cost only about \$5 million to make.¹⁶ As with so many things, putting a dollar figure on drones is difficult; it depends what costs are counted, and what time frame is used. Nevertheless, drones continue to be *perceived* as cheaper by government decision-makers.

Second, relying on drone strikes rather than alternative means reduces the domestic political costs of using lethal force. Sending manned aircraft or special operations forces after a suspected terrorist places the lives of U.S. personnel at risk, and full-scale invasions and occupations endanger even more American lives. In contrast, using armed drones eliminates all short-term risks to the lives of U.S. personnel involved in the operations.

Third, by reducing accidental civilian casualties,¹⁷ precision drone technologies reduce the perceived moral and reputational costs of using lethal force. The US government is extraordinarily concerned about avoiding unnecessary civilian casualties, and rightly so. There are moral and legal reasons for this concern, and there are also pragmatic reasons: civilian

¹² See <http://www.npr.org/2011/12/19/143926857/report-high-levels-of-burnout-in-u-s-drone-pilots>

¹³ See https://www.deloitte.com/assets/Dcom-Australia/Local%20Assets/Documents/Industries/Government%20Services/Public%20Sector/Deloitte_DefenseUAV_DI_CaseStudy_2Apr2012.pdf

¹⁴ See <http://www.economist.com/node/14299496>

¹⁵ See <http://fpc.state.gov/documents/organization/180677.pdf>

¹⁶ See http://www.nationaldefensemagazine.org/archive/2012/February/Pages/AirForceF-35s_DronesMaySquareOffinBudgetBattle.aspx

¹⁷ See <http://www.nytimes.com/2012/07/15/sunday-review/the-moral-case-for-drones.html>

casualties cause pain and resentment within local populations and host-country governments and alienate the international community.

It is of course not a bad thing to possess military technologies that are cost little, protect American lives and enable us to minimize civilian casualties. When new technologies appear to reduce the costs of using lethal force, however, the threshold for deciding to use lethal force correspondingly drops, and officials will be tempted to use lethal force with greater frequency and less wisdom.

Over the last decade, we have seen US drone strikes evolve from a tool used in extremely limited circumstances to go after specifically identified high-ranking al Qaeda officials to a tool relied on in an increasing number of countries to go after an eternally lengthening list of putative bad actors, with increasingly tenuous links to grave or imminent threats to the United States. Some of these suspected terrorists have been identified by name and specifically targeted, while others are increasingly targeted on the basis of suspicious behavior patterns.

Increasingly, drones strikes have targeted militants who are lower and lower down the terrorist food chain,¹⁸ rather than terrorist masterminds.¹⁹ Although drone strikes are believed to have killed more than 3,000 people since 2004,²⁰ analysis by the New America Foundation and more recently by a the McClatchy newspapers suggests that only a small fraction of the dead appear to have been so-called "high-value targets."²¹ What's more, drone strikes have spread ever further from "hot" battlefields, migrating from Pakistan to Yemen to Somalia (and perhaps to Mali²² and the Philippines as well).²³

This increasing use of drone strikes to go after individuals with more and more tenuous links to Al Qaeda and the 9/11 attacks pushes the furthest boundaries of Congress' 2011 Authorization for use of Military Force. The AUMF authorized the President to "[U]se all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the 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."

The AUMF's language appears to restrict the use of force both with regard to who can be targeted (those with some culpability for the 9/11 attacks) and with regard to the purpose for which force is used (to prevent future attacks against the U.S.). As drone strikes expand beyond Al Qaeda targets (to go after, for instance, suspected members of Somalia's al Shabaab), it grows increasingly difficult to justify such strikes under the AUMF. Do we believe al Shabaab was in any way culpable for the 9/11 attacks? Do we believe al Shabaab, an organization with primarily local and regional ambitions, has the desire or capability to engage in acts of international terrorism against the United States?

¹⁸ See http://articles.cnn.com/2012-09-05/opinion/opinion_bergen-obama-drone_1_drone-strikes-drone-attacks-drone-program

¹⁹ See <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/20/AR2011022002975.html>

²⁰ See <http://counterterrorism.newamerica.net/drones>

²¹ See <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/20/AR2011022002975.html>

²² See http://www.longwarjournal.org/threat-matrix/archives/2012/06/did_the_us_launch_a_drone_stri.php

²³ See <http://www.brookings.edu/research/opinions/2012/03/05-drones-philippines-ahmed>

3. The true costs of current US drone policy

When we come to rely excessively on drone strikes as a counterterrorism tool, this has potential costs of its own. Drones strikes enable a "short-term fix" approach to counterterrorism, one that relies excessively on eliminating specific individuals deemed to be a threat, without much discussion of whether this strategy is likely to produce long-term security gains.

Most counter-terrorism experts agree that in the long-term, terrorist organizations are rarely defeated militarily. Instead, terrorist groups fade away when they lose the support of the populations within which they work. They die out when their ideological underpinnings come undone – when new recruits stop appearing—when the communities in which they work stop providing active or passive forms of assistance—when local leaders speak out against them and residents report their activities and identities to the authorities.

A comprehensive counterterrorist strategy recognizes this, and therefore relies heavily on activities intended to undermine terrorist credibility within populations, as well as on activities designed to disrupt terrorist communications and financing. Much of the time, these are the traditional tools of intelligence and law enforcement. Kinetic force undeniably has a role to play in counterterrorism in certain circumstances, but it is rarely a magic bullet.

In addition, overreliance on kinetic tools at the expense of other approaches can be dangerous. Drone strikes -- lawful or not, justifiable or not – can have the unintended consequence of increasing both regional instability and anti-American sentiment. Drone strikes sow fear among the "guilty" and the innocent alike,²⁴ and the use of drones in Pakistan and Yemen has increasingly been met with both popular and diplomatic protests. Indeed, drone strikes are increasingly causing dismay and concern within the US population.

As the Obama administration increases its reliance on drone strikes as the counterterrorism tool of choice, it is hard not to wonder whether we have begun to trade tactical gains for strategic losses. What impact will US drone strikes ultimately have on the stability of Pakistan, Yemen, or Somalia?²⁵ To what degree -- especially as we reach further and further down the terrorist food chain, killing small fish who may be motivated less by ideology than economic desperation -- are we actually creating new grievances within the local population – or even within diaspora populations here in the United States?²⁶ As Defense Secretary Donald Rumsfeld asked during the Iraq war, are we creating terrorists faster than we kill them?²⁷

At the moment, there is little evidence that US drone policy – or individual drone strikes—result from a comprehensive assessment of strategic costs and benefits, as opposed to a shortsighted determination to strike targets of opportunity, regardless of long-term impact. As a

²⁴ See <http://www.economist.com/node/21561927>

²⁵ See <http://www.guardian.co.uk/world/2012/jun/05/al-qaida-drone-attacks-too-broad>

²⁶ See http://www.washingtonpost.com/world/middle_east/in-yemen-us-airstrikes-breed-anger-and-sympathy-for-al-qaeda/2012/05/29/gJQAUmK10U_story.html

²⁷ See <http://www.usatoday.com/news/washington/executive/rumsfeld-memo.htm>

military acquaintance of mine memorably put it, drone strikes remain “a tactic in search of a strategy.”

4. Drones and the rule of law

Mr. Chairman, I would like to turn now to the legal framework applicable to US drone strikes. Both the United States and the international community have long had rules governing armed conflicts and the use of force in national self-defense. These rules apply whether the lethal force at issue involves knives, handguns, grenades or weaponized drones. When drone technologies are used in traditional armed conflicts—on “hot battlefields” such as those in Afghanistan, Iraq or Libya, for instance – they pose no new legal issues. As Administration officials have stated, their use is subject to the same requirements as the use of other lawful means and methods of warfare.²⁸

But if drones used in traditional armed conflicts or traditional self-defense situations present no “new” legal issues, some of the activities and policies *enabled and facilitated* by drone technologies pose significant challenges to existing legal frameworks.

As I have discussed above, the availability of perceived low cost of drone technologies makes it far easier for the US to “expand the battlefield,” striking targets in places where it would be too dangerous or too politically controversial to send troops. Specifically, drone technologies enable the United States to strike targets deep inside foreign states, and do so quickly, efficiently and deniably. As a result, drones have become the tool of choice for so-called “targeted killing” – the deliberate targeting of an individual or group of individuals, whether known by name or targeted based on patterns of activity, inside the borders of a foreign country. It is when drones are used in targeted killings outside of traditional or “hot” battlefields that their use challenges existing legal frameworks.

Law is almost always out of date: we make legal rules based on existing conditions and technologies, perhaps with a small nod in the direction of predicted future changes. As societies and technologies change, law increasingly becomes an exercise in jamming square pegs into round holes. Eventually, that process begins to do damage to existing law: it gets stretched out of shape, or broken. Right now, I would argue, US drone policy is on the verge of doing significant damage to the rule of law.

A. The Rule of Law

²⁸ See http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf; Harold H. Koh, Keynote Address at the Annual Meeting of the American Society of International Law, Washington, DC (Mar. 25, 2010), Eric Holder, Address at Northwestern University School of Law, Chicago, IL (Mar. 5, 2011), <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>, <http://www.state.gov/s/l/releases/remarks/139119.htm>; John O. Brennan, Address at Program on Law and Security, Harvard Law School, Cambridge, MA: Strengthening our Security by Adhering to our Values and Laws (Sep. 16, 2011), <http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an>; John O. Brennan, Address at Woodrow Wilson International Center for Scholars, Washington, DC: The Ethics and Efficacy of the President’s Counterterrorism Strategy (Apr. 30, 2012), <http://www.wilsoncenter.org/event/the-ethics-and-ethics-us-counterterrorism-strategy>.

At root, the idea of “rule of law” is fairly simple, and well understood by Americans familiar with the foundational documents that established our nation, such as the Declaration of Independence, the Constitution and the Bill of Rights. The rule of law requires that governments follow transparent, clearly defined and universally applicable laws and procedures. The goal of the rule of law is to ensure predictability and stability, and to prevent the arbitrary exercise of power. In a society committed to the rule of law, the government cannot fine you, lock you up, or kill you on a whim -- it can restrict your liberty or take your property or life only in accordance with pre-established processes and rules that reflect basic notions of justice, humanity and fairness.

Precisely what constitutes a fair process is debatable, but most would agree that at a minimum, fairness requires that individuals have reasonable notice of what constitutes the applicable law, reasonable notice that they are suspected of violating the law, a reasonable opportunity to rebut any allegations against them, and a reasonable opportunity to have the outcome of any procedures or actions against them reviewed by some objective person or body. These core values are enshrined both in the US Constitution and in international human rights law instruments such as the International Covenant on Civil and Political Rights, to which the United States is a party.

In ordinary circumstances, this bundle of universally acknowledged rights (together with international law principles of sovereignty) means it is clearly unlawful for one state to target and kill an individual inside the borders of another state. Recall, for instance, the 1976 killing of Chilean dissident Orlando Letelier in Washington DC. When Chilean government intelligence operatives planted a car bomb in the car used by Letelier, killing him and a US citizen accompanying him, the United States government called this an act of murder—an unlawful political assassination.

B. Targeted Killing and the Law of Armed Conflict

Of course, sometimes the “ordinary” legal rules do not apply. In war, the willful killing of human beings is permitted, whether the means of killing is a gun, a bomb, or a long-distance drone strike. The law of armed conflict permits a wide range of behaviors that would be unlawful in the absence of an armed conflict. Generally speaking, the intentional destruction of private property and severe restrictions on individual liberties are impermissible in peacetime, but acceptable in wartime, for instance. Even actions that a combatant knows will cause civilian deaths are lawful when consistent with the principles of necessity, humanity, proportionality,²⁹ and distinction.³⁰

It is worth briefly explaining these principles. The principle of necessity requires parties to a conflict to limit their actions to those that are indispensable for securing the complete submission of the enemy as soon as possible (and that are otherwise permitted by international law). The principle of humanity forbids parties to a conflict to inflict gratuitous violence or

²⁹ See generally the US Army’s Operational Law Handbook, 2012, at http://www.loc.gov/r/rfd/Military_Law/pdf/operational-law-handbook_2012.pdf; http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter4_rule14

³⁰ See generally the US Army’s Operational Law Handbook, 2012, at http://www.loc.gov/r/rfd/Military_Law/pdf/operational-law-handbook_2012.pdf; http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule1

employ methods calculated to cause unnecessary suffering. The principle of proportionality requires parties to ensure that the anticipated loss of life or property incidental to an attack is not excessive in relation to the concrete and direct military advantage expected to be gained. Finally, the principle of discrimination or distinction requires that parties to a conflict direct their actions only against combatants and military objectives, and take appropriate steps to distinguish between combatants and non-combatants.³¹

This is a radical oversimplification of a very complex body of law.³² But as with the rule of law, the basic idea is pretty simple. When there is no war -- when ordinary, peacetime law applies -- agents of the state aren't supposed to lock people up, take their property or kill them, unless they have jumped through a whole lot of legal hoops first. When there is an armed conflict, however, everything changes. War is not a legal free-for-all³³ -- torture, rape are always crimes under the law of war, as is killing that is willful, wanton and not justified by military necessity³⁴ -- but there are far fewer constraints on state behavior.

Technically, the law of war is referred to using the Latin term "*lex specialis*" -- special law. It is applicable in—and *only* in -- special circumstances (in this case, armed conflict), and in those special circumstances, it supersedes "ordinary law," or "*lex generalis*," the "general law" that prevails in peacetime. We have one set of laws for "normal" situations, and another, more flexible set of laws for "extraordinary" situations, such as armed conflicts.

None of this poses any inherent problem for the rule of law. Having one body of rules that tightly restricts the use of force and another body of rules that is far more permissive does not fundamentally undermine the rule of law, as long as we have a reasonable degree of consensus on what circumstances trigger the "special" law, and as long as the "special law" doesn't end up undermining the general law.

To put it a little differently, war, with its very different rules, does not challenge ordinary law as long as war is the exception, not the norm -- as long as we can all agree on what constitutes a war -- as long as we can tell when the war begins and ends -- and as long as we all know how to tell the difference between a combatant and a civilian, and between places where there's war and places where there's no war.

Let me return now to the question of drones and targeted killings. When all these distinctions I just mentioned are clear, the use of drones in targeted killings does not necessarily present any great or novel problem. In Libya, for instance, a state of armed conflict clearly existed inside the borders of Libya between Libyan government forces and NATO states. In that context, the use of drones to strike Libyan military targets is no more controversial than the use of manned aircraft.

That is because our core rule of law concerns have mostly been satisfied: we know there

³¹ See generally the US Army's Operational Law Handbook, 2012, at http://www.loc.gov/rr/frd/Military_Law/pdf/operational-law-handbook_2012.pdf

³² See <http://ihl.ihlresearch.org/index.cfm?fuseaction=page.viewpage&pageid=2083>

³³ See <http://www.law.cornell.edu/uscode/text/18/2441>

³⁴ See <http://www1.umn.edu/humanrts/instree/iccelementsofcrimes.html>

is an armed conflict, in part because all parties to it agree that there is an armed conflict, in part because observers (such as international journalists) can easily verify the presence of uniformed military personnel engaged in using force, and in part because the violence is, from an objective perspective, widespread and sustained: it is not a mere skirmish or riot or criminal law enforcement situation that got out of control. We know *who* the “enemy” is: Libyan government forces. We know *where* the conflict is and is not: the conflict was in Libya, but not in neighboring Algeria or Egypt. We know *when* the conflict began, we know who authorized the use of force (the UN Security Council) and, just as crucially, we know whom to hold *accountable* in the event of error or abuse (the various governments involved).³⁵

Once you take targeted killings outside hot battlefields, it’s a different story. The Obama Administration is currently using drones to strike terror suspects in Pakistan, Somalia, Yemen, and –perhaps–Mali and the Philippines as well. Defenders of the administration’s increasing reliance on drone strikes in such places assert that the US is in an armed conflict with “al Qaeda and its associates,” and on that basis, they assert that the law of war is applicable -- in any place and at any time -- with regard to any person the administration deems a combatant.

The trouble is, no one outside a very small group within the US executive branch has any ability to evaluate who is and who isn’t a combatant. The war against al Qaeda and its associates is not like World War II, or Libya, or even Afghanistan: it is an open-ended conflict with an inchoate, undefined adversary (who exactly are al Qaeda’s “associates”?). What is more, targeting decisions in this nebulous “war” are based largely on classified intelligence reporting. As a result, Administration assertions about who is a combatant and what constitutes a threat are entirely non-falsifiable, because they’re based wholly on undisclosed evidence. Add to this still another problem: most of these strikes are considered covert action, so although the US sometimes takes public credit for the deaths of alleged terrorist leaders, most of the time, the US will not even officially acknowledge targeted killings.

This leaves all the key rule-of-law questions related to the ongoing war against al Qaeda and its “associates” unanswered.³⁶ Based on what criteria might someone be considered a combatant or directly participating in hostilities? What constitutes “hostilities” in the context of an armed conflict against a non-state actor, and what does it mean to participate in them? And just where is the war? Does the war (and thus the law of war) somehow “travel” with combatants? Does the US have a “right” to target enemy combatants anywhere on earth, or does it depend on the consent of the state at issue? Who in the United States government is authorized to make such determinations, and what is the precise chain of command for such decisions?

I think the rule of law problem here is obvious: when “armed conflict” becomes a term flexible enough to be applied both to World War II and to the relations between the United States and “associates” of al Qaeda such as Somalia’s al Shabaab, the concept of armed conflict is not very useful anymore. And when we lack clarity and consensus on how to recognize “armed conflict,” we no longer have a clear or principled basis for deciding how to categorize US

³⁵ In my previous scholarly work, I have written extensively about the challenges posed by geographically dispersed terrorist organizations to traditional legal categories. See, e.g., Rosa Brooks, *War Everywhere: Rights, National Security Law, And The Law Of Armed Conflict In The Age Of Terror*, 153 U. Pa. L. Rev. 675 (2004).

³⁶ See <http://www.hrw.org/news/2011/12/19/q-us-targeted-killings-and-international-law>

targeted killings. Are they, as the US government argues, legal under the laws of war? Or are they, as some human rights groups have argued, unlawful murder?

C. Targeted Killing and the International Law of Self-Defense

When faced with criticisms of the law of war framework as a justification for targeted killing, Obama Administration representatives often shift tack, arguing that international law rules on national self-defense provide an alternative or additional legal justification for US targeted killings. Here, the argument is that if a person located in a foreign state poses an "imminent threat of violent attack" against the United States, the US can lawfully use force in self-defense, provided that the defensive force used is otherwise consistent with law of war principles.

Like law of war-based arguments, this general principle is superficially uncontroversial: if someone overseas is about to launch a nuclear weapon at New York City, no one can doubt that the United States has a perfect right (and the president has a constitutional duty) to use force if needed to prevent that attack, regardless of the attacker's nationality.

But once again, the devil is in the details. To start with, what constitutes an "imminent" threat? Traditionally, both international law and domestic criminal law understand that term narrowly:³⁷ to be "imminent," a threat cannot be distant or speculative.³⁸ But much like the Bush Administration before it, the Obama Administration has put forward an interpretation of the word "imminent" that bears little relation to traditional legal concepts.

According to a leaked 2011 Justice Department white paper³⁹—the most detailed legal justification that has yet become public-- the requirement of imminence "does not require the United States to have clear evidence that a specific attack on U.S. persons and interests will take place in the immediate future." This seems, in itself, like a substantial departure from accepted international law definitions of imminence.

But the White Paper goes even further, stating that "certain members of al Qaeda are continually plotting attacks...and would engage in such attacks regularly [if] they were able to do so, [and] the US government may not be aware of all... plots as they are developing and thus cannot be confident that none is about to occur." For this reason, it concludes, anyone deemed to be an operational leader of al Qaeda or its "associated forces" presents, by definition, an imminent threat even in the *absence* of any evidence whatsoever relating to immediate or future attack plans. In effect, the concept of "imminent threat" (part of the international law relating to self-defense) becomes conflated with identity or status (a familiar part of the law of armed

³⁷ The most restrictive traditional formulation of the term imminent in international law can be seen in the famous 1837 Exchange of letters between US Secretary of State Daniel Webster and Lord Ashburton, Foreign Secretary of Great Britain, relating to the case of the SS *Caroline*, explaining "imminent attack" as one that is "instant, overwhelming, leaving no choice of means, and no moment for deliberation." More recent approaches have been somewhat more flexible. See, e.g., United Nations Secretary-General's High-level Panel on Threats, Challenges and Change: "A More Secure World: Our Shared Responsibility," at <http://www.un.org/secureworld/>

³⁸ See <http://opiniojuris.org/2012/03/07/why-preventive-self-defense-violates-the-un-charter/>

³⁹ See http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf

conflict).

That concept of imminence has been called Orwellian, and although that is an overused epithet, in this context it seems fairly appropriate. According to the Obama Administration, “imminent” no longer means “immediate,” and in fact the very *absence* of clear evidence indicating specific present or future attack plans becomes, paradoxically, the basis for assuming that attack may *perpetually* be “imminent.”

The 2011 Justice Department White Paper notes that the use of force in self-defense must comply with general law of war principles of necessity, proportionality, humanity, and distinction. The White Paper offers no guidance on the specific criteria for determining when an individual is a combatant (or a civilian participating directly in hostilities), however. It also offers no guidance on how to determine if a use of force is necessary or proportionate.

From a traditional international law perspective, this necessity and proportionality inquiry relates both to imminence and to the gravity of the threat itself, but so far there has been no public Administration statement as to how the administration interprets these requirements. Is *any* threat of “violent attack” sufficient to justify killing someone in a foreign country, including a U.S. citizen? Is *every* potential suicide bomber targetable, or does it depend on the gravity of the threat? Are we justified in drone strikes against targets who might, if they get a chance at some unspecified future point, place an IED that might, if successful, kill one person? Ten people? Twenty? 2,000? How grave a threat must there be to justify the use of lethal force against an American citizen abroad -- or against non-citizens, for that matter?

As I have noted, it is impossible for outsiders to fully evaluate US drone strikes, since so much vital information remains classified. In most cases, we know little about the identities; activities or future plans of those targeted. Nevertheless, given the increased frequency of US targeted killings in recent years, it seems reasonable to wonder whether the Administration conducts a rigorous necessity or proportionality analysis in all cases.

So far, the leaked 2011 Justice Department White Paper represents the most detailed legal analysis of targeted killings available to the public. It is worth noting, incidentally, that this White Paper addresses only the question of whether and when it is lawful for the US government to target US citizens abroad. We do not know what legal standards the Administration believes apply to the targeting of non-citizens. It seems reasonable to assume, however, that the standards applicable to non-citizens are less exacting than those the Administration views as applicable to citizens.

Defenders of administration targeted killing policy acknowledge that the criteria for determining how to answer these many questions have not been made public, but insist that this should not be cause for concern. The Administration has reportedly developed a detailed “playbook” outlining the targeting criteria and procedures,⁴⁰ and insiders insist that executive branch officials go through an elaborate process in which they carefully consider every possible

⁴⁰ See <http://www.uta.edu/faculty/story/2311/Misc/2013.4.1.DronesTargetedKillingWhoCanWeKill.pdf>;

issue before determining that a drone strike is lawful.⁴¹

No doubt they do, but this is somewhat cold comfort. Formal processes tend to further normalize once-exceptional activities -- and "trust us" is a rather shaky foundation for the rule of law. Indeed, the whole point of the rule of law is that individual lives and freedom should *not* depend solely on the good faith and benevolence of government officials.

As with law of war arguments, stating that US targeted killings are clearly legal under traditional self-defense principles requires some significant cognitive dissonance. Law exists to restrain untrammelled power. It is no doubt possible to make a plausible legal argument justifying each and every U.S. drone strike -- but this merely suggests that we are working with a legal framework that has begun to outlive its usefulness.

The real question isn't whether U.S. drone strikes are "legal." The real question is this: Do we really want to live in a world in which the U.S. government's justification for killing is so malleable?

5. Setting Troubling International Precedents

Here is an additional reason to worry about the U.S. overreliance on drone strikes: Other states will follow America's example, and the results are not likely to be pretty. Consider once again the Letelier murder, which was an international scandal in 1976: If the Letelier assassination took place today, the Chilean authorities would presumably insist on their national right to engage in "targeted killings" of individuals deemed to pose imminent threats to Chilean national security -- and they would justify such killings using precisely the same legal theories the US currently uses to justify targeted killings in Yemen or Somalia. We should assume that governments around the world—including those with less than stellar human rights records, such as Russia and China—are taking notice.

Right now, the United States has a decided technological advantage when it comes to armed drones, but that will not last long. We should use this window to advance a robust legal and normative framework that will help protect against abuses by those states whose leaders can rarely be trusted. Unfortunately, we are doing the exact opposite: Instead of articulating norms about transparency and accountability, the United States is effectively handing China, Russia, and every other repressive state a playbook for how to foment instability and --literally-- get away with murder.

Take the issue of sovereignty. Sovereignty has long been a core concept of the Westphalian international legal order.⁴² In the international arena, all sovereign states are formally considered equal and possessed of the right to control their own internal affairs free of

⁴¹ See <http://www.state.gov/s/l/releases/remarks/139119.htm>, <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>, <http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?pagewanted=all>

⁴² See <http://www.towson.edu/polsci/trency/sovereign.htm>

interference from other states. That's what we call the principle of non-intervention -- and it means, among other things, that it is generally prohibited for one state to use force inside the borders of another sovereign state. There are some well-established exceptions, but they are few in number. A state can lawfully use force inside another sovereign state with that state's invitation or consent, or when force is authorized by the U.N. Security Council, pursuant to the U.N. Charter,⁴³ or in self-defense "in the event of an armed attack."

The 2011 Justice Department White Paper asserts that targeted killings carried out by the United States don't violate another state's sovereignty as long as that state either consents or is "unwilling or unable to suppress the threat posed by the individual being targeted." That sounds superficially plausible, but since the United States views itself as the sole arbiter of whether a state is "unwilling or unable" to suppress that threat, the logic is in fact circular.

It goes like this: The United States -- using its own malleable definition of "imminent" -- decides that Person X, residing in sovereign State Y, poses a threat to the United States and requires killing. Once the United States decides that Person X can be targeted, the principle of sovereignty presents no barriers, because either 1) State Y will *consent* to the U.S. use of force inside its borders, in which case the use of force presents no sovereignty problems or 2) State Y will *not* consent to the U.S. use of force inside its borders, in which case, by definition, the United States will deem State Y to be "unwilling or unable to suppress the threat" posed by Person X and the use of force again presents no problem.

This is a legal theory that more or less eviscerates traditional notions of sovereignty, and has the potential to significantly destabilize the already shaky collective security regime created by the U.N. Charter.⁴⁴ If the US is the sole arbiter of whether and when it can use force inside the borders of another state, any other state strong enough to get away with it is likely to claim similar prerogatives. And, of course, if the US executive branch is the sole arbiter of what constitutes an imminent threat and who constitutes a targetable enemy combatant in an ill-defined war, why shouldn't other states make identical arguments—and use them to justify the killing of dissidents, rivals, or unwanted minorities?

6. Towards solutions: ensuring that US targeted killing policy does not undermine the rule of law.

I have suggested in this testimony that while the law of war and the international law of self-defense *may* provide justification for US targeted killing policy, it is, in practice, difficult to say for sure. This is because decisions about who is a combatant, what threats are imminent and so on are inherently fact specific. Since US targeted killings take place under a cloak of secrecy, it is impossible for outsiders to evaluate the facts or apply the law to specific facts.

⁴³ See <http://www.un.org/en/documents/charter/chapter7.shtml>

⁴⁴ See generally Rosa Brooks, *Be Careful What You Wish For: Changing Doctrines, Changing Technologies, and the Lower Cost of War*, 106 *Am. Soc'y Int'l L. Proc.* 106 (2012) and *The Strange Convergence of Sovereignty-Limiting Doctrines in Human Rights and National Security Law Discourses*, *Georgetown J. Int'l Affairs*, Issue 13-2, 2012.

I have also suggested that we face a problem that is deeper still: we are attempting to apply old law to novel situations. As I noted earlier, the law of war evolved in response to traditional armed conflicts, and cannot be easily applied to relations between states and geographically diffuse non-state terrorist organizations. When we try to apply the law of war to modern terrorist threats, we encounter numerous translation problems. Most disturbingly, it becomes nearly impossible to make a principled decision about when the law of war is applicable in the first place, and when it is not.

As I noted earlier, law is almost always out of date: legal rules are made based on the conditions and technologies existing at the time, and as societies and technologies change, law increasingly becomes an exercise in jamming square pegs into round holes. Up to a point, this works, but eventually, that process begins to do damage to existing law: it gets stretched out of shape, or broken. At that point, we need to update our laws and practices before too much damage is done.

This is a daunting project, and I do not have any simple solutions to offer. In a sense, the struggle to adapt old legal frameworks and institutions to radically new situations will be the work of generations. But the complexity of the problem should not be an excuse for ignoring it. In that spirit, I will suggest several potential means to improve on the existing state of affairs and enhance oversight, transparency and accountability. Congress can implement some of these recommendations, while others would require Administration acquiescence. Fully evaluating the pros and cons of potential reforms is beyond the scope of this testimony, but I hope that this will be the subject of future hearings.

1. Congress should encourage Administration transparency and public debate by continuing to hold hearings on targeted killing policy, its relationship to (and impact on) broader US counterterrorism, national security and foreign policy goals, and appropriate mechanisms for improving oversight, accountability and conformity to US rule of law values. Congress should also consider hearings on the longer-term challenge of adapting the law of war and law of self-defense to 21st century threats.
2. Congress should also encourage Administration transparency through the imposition of reporting requirements. Congress could require that the executive branch provide thorough reports on any uses of force not expressly authorized by Congress and/or outside specified regions, and require that such reports contain both classified sections and unclassified sections in which the Administration provides a legal and policy analysis of any use of force in self-defense or other uses of force outside traditional battlefields.
3. Congress should consider repealing the 2001 AUMF. The Obama administration's domestic legal justification for most drone strikes relies on the AUMF, which it interprets to authorize the use of force not only against those individuals and organizations with some real connection to the 9/11 attacks, but also against all "associates" of al Qaeda. This flexible interpretation of the AUMF creates few constraints, and has lowered the threshold for using force. Repealing the AUMF would not deprive the President of the ability to use force if necessary to prevent or respond to a serious armed attack: the president would retain his existing discretionary power, as chief executive and

commander in chief, to protect the nation in emergencies. Repealing the 2001 AUMF would, however, likely reduce the frequency with which the president resorts to targeted killings.

4. The Constitution gives Congress the power to “define and punish offenses against the law of nations.” Without tying the president’s hands, Congress can pass a resolution clarifying that the international law of self-defense requires a rigorous imminence, necessity and proportionality analysis, and that the use of cross-border military force should be reserved for situations in which there is concrete evidence of grave threats to the United States or our allies that cannot be addressed through other means.
5. Congress and/or the Executive branch should create a non-partisan blue ribbon commission made up of senior experts on international law, national security, human rights, foreign policy and counterterrorism. Commission members should have or receive the necessary clearances to review intelligence reports and conduct a thorough policy review of past and current targeted killing policy, evaluating the risk of setting international precedents, the impact of US targeted killing policy on allies, and the impact on broader US counterterrorism goals.

In the absence of a judicial review mechanism, such a commission might also be tasked with reviewing particular strikes to determine whether any errors or abuses have taken place. The commission should release a public, unclassified report as well as a classified report made available to executive branch and congressional officials, and the report should contain detailed recommendations, including, if applicable, recommendations for changes in law and policy and recommendations for further action of any sort, including, potentially, compensation for civilians harmed by US drone strikes. The unclassified report should contain as few redactions as possible.

6. Congress should urge the President to publicly acknowledge all targeted killings outside traditional battlefield within a reasonable time period, identifying those who were targeted, laying out (with the minimal number of appropriate redactions) the legal and factual basis for the decision to target, and identifying, to the best of available knowledge, death, property damage and injury resulting from the strike(s).
7. Congress should urge the President to release unclassified versions of all legal memoranda relating to targeted killing policy. In particular, US citizens have a right to understand the government’s views on the legality of targeting US citizens; there is no conceivable justification for failing to make this information public.
8. Congress should urge the president to also provide the public with information about the process through which targeting decisions outside traditional battlefields are made, the chain of command for such decisions, and internal procedures designed to prevent civilian casualties. Most military operational and legal manuals are publicly available, and this issue should be no different. If reports of a targeted killing “playbook” are accurate, an unclassified version should be released to the public.

9. Congress should urge the administration should convene, through appropriate diplomatic and track II channels, an international dialogue on norms governing the use of drone technologies and targeted killings. The goal should be to develop consensus and a code of conduct on the legal principles applicable to targeted killing outside a state's territory, including those relating to sovereignty, proportionality and distinction, and on appropriate procedural safeguards to prevent and redress error and abuse.
10. Congress should consider creating a judicial mechanism, perhaps similar to the existing Foreign Intelligence Surveillance Court, to authorize and review the legality of targeted killings outside of traditional battlefields. While the Administration may argue that such targeting decisions present non-justiciable political questions because of the President's commander-in-chief authority, the use of military force outside of traditional battlefields and against geographically dispersed non-state actors straddles the lines between war and law enforcement. While the President must clearly be granted substantial discretion in the context of armed conflicts, the *applicability* of the law of armed conflict to a particular situation requires that the law be interpreted and applied to a particular factual situation, and this is squarely the type of inquiry the judiciary is best suited to making.

It is also worth noting that the *practical* concerns militating against justiciability in the context of traditional wartime situations do not exist to the same degree here. On traditional battlefields, imposing due process or judicial review requirements on targeting decisions would be unduly burdensome, as many targeting decisions must be made in situations of extreme urgency. In the context of targeted killings outside traditional battlefields, this is rarely the case. While the window of opportunity in which to strike a given target may be brief and urgent, decisions about whether an individual may lawfully be targeted are generally made well in advance.

A judicial mechanism designed to ensure that US targeted killing policy complies with US law and the law of armed conflict might take any of several forms. Most controversially, a court might be tasked with the *ex ante* determination of whether a particular individual could lawfully be targeted.

This approach is likely to be strenuously resisted by the Administration on separation of powers grounds, and it also raises potential issues about whether the Constitution's case and controversy requirement could be satisfied, insofar as proceedings before such a judicial body would, of necessity, be *in camera* and *ex parte*.⁴⁵ This is also true for the existing FISA court, however, and its procedures have generally been upheld on Fourth Amendment grounds. It would seem odd to permit *ex parte* proceedings in an effort to ensure judicial approval for surveillance, but reject such proceedings as insufficiently protective of individual rights when an individual has been selected for lethal targeting rather than mere search and seizure.

I believe it would be possible to design an *ex ante* judicial mechanism that would pass constitutional and practical muster. It would be complex and controversial, however, and there is an alternative approach that might offer many of the same benefits with far fewer

⁴⁵ See <http://www.lawfareblog.com/2013/02/why-a-drone-court-wont-work/>

of the difficulties. This alternative approach would be to develop a judicial mechanism that conducts a post hoc review of targeted killings, perhaps through a statute creating a cause of action for damages for those claiming wrongful injury or death as a result of unlawful targeted killing operations. This would add additional incentives for executive branch officials to abide by the law, without placing the judiciary in the troubling role of authorizing or rejecting the use of military force in advance. While proceedings might need to be conducted at least partially *in camera*, judicial decisions in these cases could be released in redacted form.

It is not possible for this testimony to fully address the many permutations of potential judicial review mechanisms for targeted killing, but I hope this is an issue that will generate further discussion and inquiry in this sub-committee. To that end, it is worth noting that the notion of judicial review of targeted killing is one that has been validated by the courts of one of our closest allies, Israel.

The Israeli Supreme Court addressed the issue of targeted killing in a 2006 decision, and roundly rejected the view that targeted killing presents a non-justiciable issue.⁴⁶ The court insisted that the legality of each targeted killing decision must be individually considered in light of domestic and international legal requirements. It determined that while the conflict between Israel and Palestinian terrorist organizations was an international armed conflict, individual terrorist suspects were civilians who become targetable by virtue (and only by virtue) of their direct participation in hostilities, a concept the court analyzed in detail. The court also noted that international law requires independent investigations when civilians are targeted because of their suspected participation in hostilities. While specific judicial review mechanisms in the US might reasonably be expected to vary from those in place in Israel, the Israeli experience strongly suggests that there is no inherent reason judicial review of targeted killings could not occur.

Conclusion

Mr. Chairman, Senator Cruz and members and staff of the subcommittee, we need to start talking honestly about drones, the activities they enable and the strategic and legal frameworks in which these activities take place. Drone critics need to end their irrational insistence on viewing drones as somehow inherently “immoral.” But drone strike boosters also need to engage in a more honest conversation, and grapple with the argument that although drone strikes appear to offer cheap and low-risk “quick fix” approach to counterterrorism, they may well be doing the US as much harm as good.

In particular, we need to address the rule of law implications of US targeted killing policy. Every individual detained, targeted, and killed by the U.S. government may well deserve his fate. But when a government claims for itself the unreviewable power to kill anyone,

⁴⁶ See http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.HTM

anywhere on earth, at any time, based on secret criteria and secret information discussed in a secret process by largely unnamed individuals, it undermines the rule of law.

One can argue, as the Obama Administration does, that current US drone policy is entirely lawful, and perhaps this is so, if we're willing to take virtually everything about the strikes on faith, and don't mind jamming square pegs into round holes. But "legality" is not the same as morality or common sense. Current US drone policy offers no safeguards against abuse or error, and sets a dangerous precedent that other states are sure to exploit.

Thank you once again for affording me this opportunity to testify. There is nothing preordained about how we use new technologies, but by lowering the perceived costs of using lethal force, drone technologies enable a particularly invidious sort of mission creep. When covert killings are the rare exception, they do not pose a fundamental challenge to the legal, moral, and political framework in which we live. But when covert killings become a routine and ubiquitous tool of U.S. foreign policy, we cannot afford to let them remain in the legal and moral shadows.

We need an honest conversation about how to bring targeted killings under a rule of law umbrella, by creating more transparent rules and more robust checks and balances. I am grateful to all of you for helping to foster such an honest conversation.



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**HEARING ON “DRONE WARS: THE CONSTITUTIONAL
AND COUNTERTERRORISM IMPLICATIONS OF
TARGETED KILLING”**

**TESTIMONY BEFORE THE
UNITED STATES SENATE JUDICIARY SUBCOMMITTEE ON THE
CONSTITUTION, CIVIL RIGHTS, AND HUMAN RIGHTS**

April 23, 2013

INTRODUCTION.

I am grateful for the opportunity to address some of the important issues raised the use targeted killing in the War on Terror, before this Subcommittee. I would like to thank Chairman Durbin, Ranking Member Cruz and the other members for their interest in these questions.

Because I was only notified about the invitation to testify late on Thursday, April 18, this statement cannot be as thorough and detailed as it might have been otherwise. I would be happy to augment it in answer to written questions after the hearing, if members of the Subcommittee would find that useful.

In my view, the use of targeted killings by drones is not inherently illegal or immoral. It is a legitimate weapon of war in the struggle against al Qaeda and associated terrorist groups. However, serious constitutional and other problems arise if the US government fails to take proper care to ensure that the use of drones is strictly limited to legitimate terrorist targets. These dangers are likely to be at their most severe in the admittedly rare cases involving American citizens. I would urge the Subcommittee and Congress generally to consider adopting procedural safeguards that would minimize the likelihood of erroneous or illegal drone strikes. One proposal that deserves serious consideration is the establishment of an independent court that would oversee drone strikes in advance.

I. WHY TARGETED KILLING IS NOT INHERENTLY ILLEGAL OR IMMORAL.

The Authorization for the Use of Military Force enacted by Congress on September 14, 2001 authorizes the president 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.”¹ This is generally understood as creating a legal state of war between the United States and Al Qaeda and its allies. The Supreme Court has recognized this, describing the conflict we are engaged in as “the war with al Qaeda.”² Similarly, President Obama, like President George W. Bush before him, has emphasized that “we are indeed at war with Al Qaeda and its affiliates.”³ Thus, all three branches of government have recognized that a state of war exists, and that therefore the United States is entitled to use all measures normally permitted in warfare against its enemies.

In wartime, the individualized targeting of an enemy commander is surely both legal and moral. During World War II, for example, the United States targeted Japanese Admiral Isoroku Yamamoto, and the British and Czechs successfully targeted German SS General Reinhard Heydrich.⁴ Few if any serious commentators claim that these operations and others like them were either illegal or morally dubious.

If it is permissible to individually target a uniformed enemy officer, such as Admiral Yamamoto in World War II, it is surely legitimate to do the same to the leader of a terrorist organization. Indeed, it would be perverse if terrorist leaders enjoyed greater protection against targeting than uniformed military officers. Unlike the latter, terrorists do not even pretend to obey the laws of war. And they deliberately endanger civilians by choosing not to wear distinctive uniforms. To give terrorists greater protection against targeted killing than that enjoyed by uniformed military personnel would in effect reward and incentivize illegal behavior that endangers innocent civilians by making it harder to distinguish them from combatants.

In some ways, individual targeting of terrorist leaders is actually *more* defensible than mass targeting of their underlings. Leaders usually bear greater moral and legal responsibility for the activities of their groups than do low-level members. And, at least in some cases,

¹ AUMF § 2(a), Pub. L. No. 107-40, 115 Stat. 224.

² *Hamdan v. Rumsfeld*, 548 U.S. 557, 628 (2006); Cf. *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004) (holding that the AUMF authorizes detention of enemy combatants because such detention is “a fundamental incident of waging war”).

³ President Barack Obama, Statement of May 21, 2009, quoted in Benjamin Wittes, *Drones and the War On Terror: When Can the US Target Alleged American Terrorists Overseas*, Statement before the House Committee on the Judiciary, at 2-3 available at <http://www.lawfareblog.com/wp-content/uploads/2013/02/Wittes-02272013.pdf>

⁴ See DONALD A. DAVIS, *LIGHTNING STRIKE: THE SECRET MISSION TO KILL ADMIRAL YAMAMOTO AND AVENGE PEARL HARBOR* (2005); CALLUM MACDONALD, *THE KILLING OF REINHARD HEYDRICH: THE SS “BUTCHER OF PRAGUE”* (1998).

individual targeting of leaders is less likely to inflict collateral damage on civilians than conventional attacks on groups.

This analysis does not change if the enemy leader happens to be an American citizen. Surely the targeting of Admiral Yamamoto would not have become illegal or immoral if he had acquired dual US citizenship while living in the United States during the 1920s. As Justice Sandra Day O'Connor noted in her majority opinion for the Supreme Court in *Hamdi v. Rumsfeld*, "[a] citizen, no less than an alien, can be part of or supporting forces hostile to the United States or coalition partners and engaged in an armed conflict against the United States."⁵ Benjamin Wittes of the Brookings Institution correctly points out that "Americans have fought in foreign armies against their country in numerous armed conflicts in the past, and their citizenship has never relieved them of the risks of that belligerency."⁶ Most obviously, nearly all the combatants arrayed against US forces in the Civil War were American citizens. Yet that did not prevent the Union Army from targeting them with lethal force or make it illegal to do so.

Giving American citizens who join terrorist organizations blanket immunity from individual targeting is also problematic because it would increase terrorists' incentives to recruit Americans. Obviously, a terrorist leader who is immune from individually targeted attack can be more effective than one who is not.

There is also no reason to believe that the use of drones for such targeting raises any greater moral or legal problems than the use of conventional weapons such as air strikes, attacks by ground forces, or artillery. Drones can, of course, be used in ways that are illegal, unethical, or unwise. For example, they could be used to deliberately target civilians. But the same is true of virtually every other weapon of war.

Given the existence of a state of war, I believe that the Obama administration was correct to conclude in its recently released White Paper that it is legal for the government to target US citizens who are "senior operational leader[s] of al-Qa'ida or an associated force."⁷

Some critics of the Administration White Paper focus on the possible weaknesses of the memo's three additional requirements for the targeted killing of a US citizen: that "(1) an informed, high-level official of the US government has determined that the targeted individual poses an imminent threat of violent attack against the United States, (2) capture is infeasible and the United States continues to monitor whether capture becomes feasible, and (3) the operation would be conducted in a manner consistent with applicable law of war principles."⁸ Law Professor Gerard Magliocca, for example, argues that "[t]he White Paper says that a citizen is eligible for death-by-drone when 'an informed, high-level, official of the

⁵ *Hamdi*, 542 U.S. at 519 (quotation omitted).

⁶ Wittes, *Drones and the War on Terror* at 6.

⁷ Department of Justice White Paper, *Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who is a Senior Operational Leader of Al-Qa'ida or An Associated Force* (n.d.), at 1, available at http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf ("DOJ White Paper").

⁸ DOJ White Paper at 1.

U.S. government has determined that the targeted individual poses an imminent threat of violent attack against the United States.’ In my opinion, this threshold is too low.”⁹ But the “imminent threat” test applies only to people located outside the United States who are “senior operational leaders of al-Qa’ida or an associated force,” not to just anyone who “an informed...official” believes to be a threat.¹⁰ In other words, the requirements that the target pose an “imminent threat” and cannot be captured are *in addition* to the requirement that he be a senior leader of Al Qaeda or one of its “associated forces.”

Once this key point is recognized, many of the objections to the memo are weakened. Indeed, a senior al Qaeda leader likely qualifies as a legitimate target even if he does not pose an “imminent threat.” It was surely permissible to target Admiral Yamamoto even if the US did not have any proof that he was planning “imminent” military operations against US forces. The fact that he was a top enemy commander in an ongoing war was enough. Here as elsewhere, there is no good reason to give terrorist leaders greater immunity from attack than that enjoyed by uniformed military officers.

Even when the use of targeted killing is both legal and moral, it is not always prudent and wise. In many cases, it might be desirable to refrain from otherwise unproblematic strikes in order to avoid antagonizing civilian populations in the relevant region, or for other strategic reasons. Such considerations are extremely important, but probably best left to those with greater expertise on the relevant issues than I possess. I note them here only to emphasize that I do not claim that the US government should indiscriminately resort to the use of targeted killing in every instance where it might be legally permissible to do so. To the contrary, a prudent government should exercise great caution in ordering such operations.

II. THE TARGETING DILEMMA.

Although the targeting of genuine al Qaeda leaders is legally and morally unproblematic, the administration’s policy of targeted killing still raises serious questions. The key issue is whether we are following rigorous enough procedures to ensure that the people targeted by drone strikes really are members of terrorist organizations at war with the United States.

A. Choosing Targets.

Unfortunately, identifying al Qaeda leaders is a far more difficult task than identifying enemy officers in a conventional war. Precisely because terrorists do not wear uniforms and often do not have a clear command structure, it is easy to make mistakes. And where US citizens are involved, there is the danger that the government will target someone merely because that person is a political enemy of the current administration. Even if officials are acting entirely in good faith, there is still a serious risk that innocent people will be targeted in error.

⁹ Gerard Magliocca, *Legal Justification For Drone Attacks on Citizens*, BALKINIZATION, Feb. 5, 2013, available at <http://balkin.blogspot.com/2013/02/legal-justification-for-drone-attacks.html>.

¹⁰ DOJ White Paper at 1.

The DOJ White Paper does not even consider the question of how we decide whether a potential target really is a terrorist leader or not. But that is the most difficult and dangerous issue that must be considered.

The problem is not an easy one. On the one hand, war cannot wait on elaborate judicial processes. And we usually cannot give a potential target an opportunity to contest his designation in court without tipping him off. On the other hand, it is both dangerous and legally problematic to give the president and his subordinates unconstrained power to designate American citizens as “terrorist leaders” and then target them at will.

A drone strike aimed at American citizen without adequate evidence showing that he or she is a terrorist combatant raises serious constitutional problems. In particular, it is likely to violate the Due Process Clause of the Fifth Amendment, which forbids government deprivation of “life, liberty, or property without due process of law.”¹¹ Legal scholars and jurists have spilled many barrels of ink debating the exact meaning of these words. But at the very least, they surely prevent the executive from unilaterally ordering the death of American citizen without at least some substantial proof that he is an enemy combatant, and perhaps an independent judicial determination thereof.¹² As the Supreme Court has recognized, the Bill of Rights protects American citizens overseas, as well as domestically.¹³ Whether non-citizens are also entitled to the protection of the Due Process Clause when targeted beyond the boundaries of the United States is more disputable. Even though the text of the Amendment extends to all “persons,” some historical evidence suggests that the Due Process Clause was originally understood as not applying to foreigners outside US jurisdiction.¹⁴

The risk of either inadvertent or deliberate targeting of innocent people is heightened by the growing scale of targeted killing over the last several years. According to leading counterterrorism expert Peter Bergen, the Obama Administration conducted 283 drone strikes in Pakistan alone between 2009 and late 2012, more than six times as many as in the years of the George W. Bush administration.¹⁵ These strikes go well beyond targeting “senior” terrorists. Indeed, only 13% of them succeeded in killing a terrorist or “militant” leader.¹⁶ A recent analysis of government documents obtained by McClatchy Newspapers suggests that the vast majority of drone strikes under the Obama administration have been aimed at low-level al Qaeda and Taliban members.¹⁷ During a 12 month period ending in September 2011, McClatchy estimates that drone strikes in Pakistan killed some 482 people, of which only 8 were “senior al Qaeda leaders” and 265 were low-level “militants.”¹⁸ Low-

¹¹ U.S. CONST. AMEND. V.

¹² See Michael Ramsey, *Meet the New Boss: Continuity in Presidential War Powers?*, 35 HARVARD JOURNAL OF LAW & PUBLIC POLICY 864, 867-70 (2012).

¹³ See *Reid v. Covert*, 354 U.S. 1, 5-6 (1957) (holding that “we reject the idea that when the United States acts against citizens abroad, it can do so free of the Bill of Rights”).

¹⁴ Ramsey, *Meet the New Boss*, at 867-68.

¹⁵ Peter Bergen, *Drone is Obama's Weapon of Choice*, CNN.com, Sept. 19, 2012, available at <http://www.cnn.com/2012/09/05/opinion/bergen-obama-drone>.

¹⁶ *Id.*

¹⁷ Jonathan S. Landay, *Obama's Drone War Kills "Others," Not Just al Qaeda Leaders*, MCCLATCHY NEWSPAPERS, Apr. 9, 2013, available at <http://www.mcclatchydc.com/2013/04/09/188062/obamas-drone-war-kills-others.html>.

¹⁸ *Id.*

level terrorists and their allies are still legitimate targets. But the extension of the targeted killing program to cover such minor figures necessarily heightens the risk of error and abuse.

A related challenge is the extension of targeted killings to cover radical Islamist groups that have few or no ties to al Qaeda or the Taliban. The AUMF only authorizes military action against “those nations, organizations, or persons [the president] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons.”¹⁹ As Harvard Law School Professor and former head of the Office of Legal Counsel Jack Goldsmith points out, the AUMF “is a tenuous foundation for military action against newly threatening Islamist terrorist groups ... that have ever-dimmer links to the rump al-Qaeda organization.”²⁰ The difficulty of determining which groups are closely enough affiliated with al Qaeda to be covered by the AUMF also heightens the danger of error and abuse in target selection.

In this testimony, I do not address the special issues raised by the potential use of targeted killings on American soil. But I agree with Attorney General Eric Holder’s recent statement indicating that the president does not “have the authority to use a weaponized drone to kill an American not engaged in combat on American soil.”²¹

B. Possible Institutional Safeguards.

One partial solution to the problem of target selection would be to require officials to get advance authorization for targeting a United States citizen from a specialized court, similar to the FISA Court, which authorizes intelligence surveillance warrants for spying on suspected foreign agents in the United States. The specialized court could act faster than ordinary courts do and without warning the potential target, yet still serve as a check on unilateral executive power. In the present conflict, there are relatively few terrorist leaders who are American citizens. Given that reality, we might even be able to have more extensive judicial process than exists under FISA.

Professor Amos Guiora of the University of Utah, a leading expert on legal regulation of counterterrorism operations with extensive experience in the Israeli military, has developed a proposal for a FISA-like oversight court that deserves serious consideration by this subcommittee, and Congress more generally.²² The idea of a drone strike oversight court has also been endorsed by former Secretary of Defense Robert Gates, who served in that position in both the Obama and George W. Bush administrations. Gates emphasizes that “some check

¹⁹ AUMF § 2(a), Pub. L. No. 107-40, 115 Stat. 224.

²⁰ Jack Goldsmith, *US Needs a Rulebook for Secret Warfare*, WASHINGTON POST, Feb. 5, 2013, available at http://www.washingtonpost.com/opinions/us-needs-rules-of-engagement-for-secret-warfare/2013/02/05/449f786e-6a78-11e2-95b3-272d604a10a3_story.html.

²¹ Attorney General Eric Holder, *Letter to Senator Rand Paul*, Mar. 7, 2013, available at <http://www.paul.senate.gov/files/documents/WhiteHouseLetter.pdf>.

²² See Amos Guiora, *Drone Policy: A Proposal Moving Forward*, THE JURIST, Mar. 4, 2013, available at <http://jurist.org/forum/2013/03/amos-guira-drone-policy.php>; See also AMOS GUIORA, LEGITIMATE TARGET: A CRITERIA-BASED APPROACH TO TARGETED KILLING (2013).

on the president's ability to do this has merit as we look to the long-term future," so that the president would not have the unilateral power of "being able to execute" an American citizen.²³

We might even consider developing a system of judicial approval for targeted strikes aimed at non-citizens. The latter process might have to be more streamlined than that for citizens, given the larger number of targets it would have to consider. But it is possible that it could act quickly enough to avoid compromising operations, while simultaneously acting as a check on abusive or reckless targeting. However, the issue of judicial review for strikes against non-citizens is necessarily more difficult than a court that only covers relatively rare cases directed at Americans.

Alternatively, one can envision some kind of more extensive due process within the executive branch itself, as advocated by Neal Katyal of the Georgetown University Law Center.²⁴ But any internal executive process has the flaw that it could always be overridden by the president, and possibly other high-ranking executive branch officials. Moreover, lower-level executive officials might be reluctant to veto drone strikes supported by their superiors, either out of careerist concerns, or because administration officials are naturally likely to share the ideological and policy priorities of the president. An external check on targeting reduces such risks. External review might also enhance the credibility of the target-selection process with informed opinion both in the United States and abroad.

Whether targeting decisions are made with or without judicial oversight, there is also an important question of burdens of proof. How much evidence is enough to justify classifying you or me as a senior Al Qaeda leader? The administration memo does not address that crucial question either.

Obviously, it is unrealistic to hold military operations to the standards of proof normally required in civilian criminal prosecutions. But at the same time, we should be wary of giving the president unfettered power to order the killing of citizens simply based on his assertion that they pose a threat. Amos Guiora suggests that an oversight court should evaluate proposed strikes under a "strict scrutiny standard" that ensures that strikes are only ordered based on intelligence that is "reliable, material and probative."²⁵ It is difficult for me to say whether this standard of proof is the best available option. But the issue is a crucial one that deserves further consideration. Ideally, we need a standard of proof rigorous enough to minimize reckless or abusive use of targeted killing, but not so high as to preclude its legitimate use.

Neither judicial review nor any other oversight system can completely eliminate all errors from the system. Given the limitations of intelligence and the fallibility of human decision-makers, some mistakes are probably inevitable. The only way avoid all error is to ban

²³ Quoted in Amanda Sakuma, *Ex-Pentagon Chief Backs Oversight on Drone Strikes*, MSNBC, Feb. 10, 2013, available at <http://tv.msnbc.com/2013/02/10/ex-pentagon-chief-backs-oversight-on-drone-strikes/>

²⁴ See Neal K. Katyal, *Who Will Mind the Drones?* N.Y. TIMES, Feb. 20, 2013, available at http://jurist.org/forum/2013/03/amos-guira-drone-policy.phphttp://www.nytimes.com/2013/02/21/opinion/an-executive-branch-drone-court.html?_r=0.

²⁵ Guiora, *Drone Policy*; see also GUIORA, LEGITIMATE TARGET, at chs. 4-5.

targeted killing entirely. But that approach might actually lead to greater loss of innocent life overall, by making it more difficult to combat terrorism and by incentivizing policymakers to use military tactics that often cause greater loss of life than targeted drone strikes.

What we can hope to achieve is an oversight system that greatly diminishes the risk of serious abuse: targeted killings that are undertaken recklessly or - worse still - for the deliberate purpose of eliminating people who do not pose any genuine threat, but are merely attacked because they are critics of the government, or otherwise attracted the wrath of policymakers.

Overall, we should seek to establish procedural safeguards that provide a check on executive discretion without miring the process in prolonged litigation that makes it impossible to conduct operations in "real time." We cannot achieve anything approaching perfection. But it is reasonable to hope that we can improve on the status quo.

Judicial oversight can help ensure that we are targeting the right individuals. But courts are less likely to be effective in addressing the problem of defining the range of *groups* that we are at war with. Our enemies probably are not limited to individuals formally affiliated with al Qaeda, since that organization has a variety of allies that support it. But the AUMF is not broad enough to cover all radical Islamist groups everywhere, nor is it desirable that we wage war against all of them. Ultimately, only Congress can properly clarify the scope of the conflict we are engaged in.

Like many commentators and legal scholars across the political spectrum, I hope that Congress enacts a framework statute defining the scope of the War on Terror, and regulating the use of targeted killing, including appropriate procedural safeguards. So far, however, it has not chosen to do. It may take a highly visible disaster such as the deliberate or clearly reckless targeting of an obviously innocent person, to stimulate appropriate legislative action. At that point, it may be too late to reverse either the resulting harm to innocent people or the damage to the public image and foreign policy interests of the United States. But I very much hope that such a conjecture is unduly pessimistic.

Prepared Statement of Martha McSally, Colonel (retired), USAF
Senate Judiciary Sub-Committee on The Constitution, Civil Rights and Human Rights
23 April 2013

Mr. Chairman and Members of the Sub-Committee, thank you for the opportunity to testify before you today on this important issue. My testimony today is based on my military experience with targeting procedures, remotely piloted aircraft (commonly referred to as drones) and national security expertise. As the Chief of Current Operations at United States Africa Command from July 2007-April 2010, I led the planning and execution oversight for targeting operations in Africa. I have also worked with remotely piloted aircraft as an A-10 Squadron Commander in Afghanistan and while serving in various roles at the Air Operations Center for operations in Iraq and Afghanistan. I was on the leadership team in the Air Operations Center in Saudi Arabia when we first used an MQ-1 Predator for intelligence, surveillance and reconnaissance (ISR) in Iraq and also when a Predator was first employed to conduct a strike with a Hellfire missile in Afghanistan after 9/11. As an A-10 Squadron Commander in Afghanistan, my unit supported special operations forces conducting counter-terrorism missions in the theater.

Throughout my military career, I also participated in efforts to improve our joint Time Sensitive Targeting (TST) processes and capabilities in order to shorten the time from "sensor to shooter" while increasing effectiveness and minimizing collateral damage. As a former Professor of National Security Studies at the George C. Marshall Center, I lectured and taught on a variety of national and international security topics including counter-terrorism, Afghanistan, counter-insurgency, and stability operations.

Since this hearing is unclassified and I am now retired, I will speak in generalities at the unclassified level. I would encourage the Sub-Committee Members to seek classified briefings from the Pentagon and Intelligence Agencies to gain more specifics on the targeting process. My testimony will focus on the targeting process within the military.

Terminology

The word "drone" has a connotation that might lead to misperceptions about its capabilities and operations. The military initially used the term Unmanned Aerial Vehicle (UAV) for its aircraft without pilots onboard, but that term did not fully capture the amount of personnel and systems involved in the operations and decision making process of a UAV mission. So the military expanded its terminology to Unmanned Aerial System (UAS). A UAS typically includes several aircraft and sensors, a ground control system (GCS), a satellite link, spare equipment, and

the operations and maintenance personnel for 24-hour operations. There is now a wide diversity of UAV/UAS platforms and systems used for civilian and military capabilities.

The military is now using the term Remotely Piloted Aircraft (RPA) for the types of UAVs that require a pilot to be actively flying the platform, but from a remote location. The MQ-1 Predator and MQ-9 Reaper are the two main RPAs used for targeted strikes. It takes over 200 operations and intelligence personnel to sustain an RPA like the Predator or Reaper in an orbit for 24 hours. A pilot flies the aircraft remotely and an operator controls the ISR sensor and weapons. The MQ-1 and MQ-9 RPAs are each also part of a larger UAS consisting of multiple RPAs with sensors, a GCS, satellite link and support equipment/personnel.

I will use the term RPA to refer to the unmanned aerial platforms used in targeted strikes for the remainder of my testimony.

RPA Capabilities

RPAs provide unprecedented intelligence and strike capability with persistence, precision, and oversight. RPAs can loiter overhead target areas around the clock and provide real-time infrared and electro-optical streaming video while remaining undetected in low threat environments. Once a decision to strike has been made and strike criteria have been met, RPAs provide the ability to have real-time intelligence and oversight with the capability to abort the strike at the last minute if conditions change. The AGM-114 laser guided Hellfire missile has a very small blast and fragmentation (frag) weapons footprint which minimizes collateral damage. The RPA also provides immediate post-strike assessment capability.

Three Questions

The questions and concerns about the use of RPAs as a vehicle for targeted strikes should be broken down into three main elements: legality; strategy; and platform selection. I will briefly address each of these and my remarks and expertise focus mainly on the third issue of platform selection.

1) Is it Legal?

Any use of force by a U.S. government agency must comply with the Constitution and other expressions of U.S. law as well as international law. In the case of targeted strikes with RPAs, the applicable law is the 2001

Authorization for the Use of Military Force (AUMF) along with the President's authority under Article II of the Constitution. The Law of Armed Conflict (LOAC) also applies to the use of force in military operations. LOAC is derived from international law, and military personnel are required to comply with LOAC, including the key principles of proportionality, necessity, distinction, and humanity in combat operations.

I will leave a detailed discussion on the legalities of targeted strikes with RPAs to the legal experts on the panel. However, I will say that in my experience, once a strategic legal analysis is made that use of force is legal and authorized, any use of force by the military in conventional combat or counter-terrorism operations also has a thorough and rigorous legal analysis throughout. The military Judge Advocate General (JAG) officers have always been right in the middle of the targeting process advising the planners and commanders to ensure any actions comply with domestic law and LOAC.

2) Is it good strategy?

Just because the use of force is legal, does not mean it is good policy or strategy to achieve national security or military objectives. Tom Wingfield, my colleague and a Professor of International Law at the Marshall Center stated it this way: "The world of legal options in wartime is surprisingly broad, but some legal options are counterproductive (losing hearts and minds, lawful but politically unacceptable levels of collateral damage, undercutting the host nation government's legitimacy and apparent effectiveness, etc.) and some are not. These are valid questions for military commanders and political officials to ask as they chose options from the long menu given them by the lawyers. You can be a dope long before you become a war criminal." (personal email from T. Wingfield to M. McSally on 2/7/13)

On many occasions, my team at U.S. Africa Command planned a strike against a target that was determined to be legal, but the strike was not conducted for a variety of strategy considerations. These considerations included evaluations of the impact of the strike on protecting vital national interests, impact on diplomatic relations, and risk of civilian casualties.

3) Which of many platforms should be used to conduct the mission?

Although not a purely linear process, once it is determined that a strike is legal and an appropriate strategy, the platform for conducting the strike must be considered and selected. The process is not purely linear because

sometimes a limitation on what platform is available and viable for use will result in a decision that the strike is not a wise or viable strategy, at least at that time.

Depending on the circumstances, there could be many platforms to choose from to conduct a strike. I will consider a fighter/bomber strike, sea-launched cruise missile, special operations "boots on the ground" kill/capture mission, ground launched mortar/artillery, and an RPA strike for this testimony.

- a.) *Fighter/bomber strike:* In order to conduct a fighter bomber strike, actionable intelligence is required followed by the lead time required to plan, brief, and travel to/from the target area. A fighter/bomber strike would also potentially require diplomatic overflight clearances, air refueling support, ISR aircraft, and airborne command and control to provide real time updates, clearance to strike, and abort decisions. Munitions from fighters and bombers can be high-precision with low collateral damage. If there is no ISR asset overhead providing real-time intelligence, the final strike decision is made by the pilot in command. Therefore commanders, intelligence and legal experts are not in the final strike decision and abort process.
- b.) *Sea-launched cruise missile:* A Tomahawk land attack missile (TLAM) can be launched from a naval ship for the strike. A TLAM strike requires the target be located within range of the missile as well as lead time to plan for specific coordinates. A TLAM has a larger weapons footprint than most fighter/bomber and RPA munitions, which is a collateral damage consideration. Some TLAM models cannot abort or change targets once launched so if the target moves or civilians move into the area, the strike cannot be aborted.
- c.) *Boots on the ground:* Ground-based options, such as a special operations mission, involve sending in troops to capture/kill a target. These "boots on the ground" can provide flexibility and the ability to gain intelligence from the target and target area. The troops need to be deployed and ready to launch from an air, ground, or sea platform in relatively close proximity to the target area. This option is precise but takes lead time for deployment and planning, puts U.S. troops in harm's way, and has the potential for U.S. casualties. In addition, if the troops are obliged to fight their way to the target, or fight their way out, there is potential for civilian casualties as well.

- d.) Mortar/artillery:* If the U.S. has ground forces in range, these platforms could be an option. In general, these platforms have the least precision (normal miss distances of from 250 to 1000 feet) so there is potential for not achieving the strike objective, as well as a greater risk of collateral damage.
- e.) RPA:* An RPA platform has the advantage that it is an ISR and strike platform and can loiter overhead around the clock to ensure all strike criteria are met, collateral damage is minimized (normal miss distances of less than 10 feet), and commanders have oversight of the targeting process throughout all phases. An RPA carries the AGM-114 Hellfire missile which is a precision weapon with a very small blast/frag footprint, minimizing civilian casualties. However, RPAs are vulnerable to a variety of relatively low-tech anti-aircraft defenses, so they typically require a rather benign threat environment in order to operate effectively.

Once a decision has been made that it is legal and wise strategy to conduct a targeted strike, the RPA platform is usually the hands-down best choice to maximize precision, persistent intelligence, responsiveness, and oversight by commanders/intelligence experts/legal experts. It also has the benefit of minimizing civilian casualties at with risk of U.S. casualties and at relatively low cost.

Due to the time sensitive nature of actionable intelligence and the potential for the target and collateral damage circumstances to be fleeting, legal and strategy approval is desired in advance for a specific target with strict strike criteria required prior to weapons release. Using a variety of intelligence resources, it can take minutes, hours, days, weeks or longer to meet strike criteria. Further, favorable conditions often suddenly present themselves. Therefore, a fighter/bomber strike is often impractical for targeted strikes due to the additional lead time required for planning, asset deployment, and overflight clearances. It is also impractical and cost-prohibitive to have fighters/bombers in 24 hour orbits waiting for strike criteria to be met. This option was appropriate and utilized during the height of the early days of conflict in Afghanistan and Iraq, where we executed previously developed and approved TST processes to divert aircraft already airborne from one target to another or had assets on alert able to respond quickly.

Similarly, a boots on the ground capture/kill mission could be impractical due to the requirements and time for the assets to deploy and remain on alert for potentially long periods of time waiting for strike criteria to be met. The risk of U.S. casualties and civilian casualties and the diplomatic/strategic implications of the presence

of ground forces make this option often undesirable unless the target is of extraordinary value (for example UBL) or ideal operational and intelligence circumstances exist.

TLAMs have been used for targeted strikes with minimal effectiveness due to the risk of the target moving during the lead time required for planning and flight time of the missile. Mortar or artillery strikes are not practical in current areas that targeted strikes are conducted since assets are normally not deployed within range.

Targeting Process

Once the legal and strategy assessment decisions have been made to approve a target, the targeting process in conventional air and space operations is summarized into six often overlapping steps: find, fix, track, target, engage, and assess (F2T2EA). Special operations forces use a similar six step process: find, fix, finish, exploit, analyze, and disseminate (F3EAD). I will briefly discuss the special operations process steps of find, fix, finish at the unclassified level. The entire process is incredibly meticulous with extraordinary levels of analysis and oversight.

I will not address the process of how a particular individual is approved for placement on a targeting list based on intelligence analysis of his/her role in Al-Qaeda and its affiliates. I encourage Sub-Committee members to obtain classified briefings from Intelligence Agencies on that process.

Prior to any targeted strike, days, weeks, months, and sometimes years of intelligence gathering and assessment are conducted in order to lay the groundwork for the “find” phase. This phase includes using all sources of intelligence including human intelligence (HUMINT), image intelligence (IMINT), and signals intelligence (SIGINT). It often takes the dedication and focus of limited airborne and space based ISR assets to geographically locate the target.

The “fix” phase of the targeting process is a very thorough process with a high degree of oversight. This phase includes: positively identifying the target; geographically locating the target with a high degree of certainty; platform selection (based on considerations mentioned earlier plus required weapons effects); deconfliction between friendly forces and assets to avoid fratricide; airspace clearance; collateral damage assessment; and legal assessment.

As the higher level legal and strategy assessment is going on, the process often transitions fluidly from the “find” to the “fix” phase and back again.

Once criteria have been met and strike approval is granted, the "finish" phase commences and the platform selected is given orders to conduct the strike.

If an RPA is the platform of choice, the time between strike approval and weapons release is minimal, maximizing the opportunity to reach the desired effect. The RPA is normally loitering overhead and providing real-time monitoring of the target. Unlike other platforms, the RPA platform enables commanders, analysts, and legal experts to monitor the target area in all phases of the targeting process with the ability to abort the strike if the target moves or civilians enter the area. This oversight is unprecedented. As a comparison, during a close air support mission in Afghanistan with A-10s from my squadron, rules of engagement were set and final decisions on weapons release were left with the enlisted ground controller supported by the Lieutenant or Captain pilot above, both of which are under stress due to the complexity and danger of combat situations.

For targeted strikes of fleeting targets in low air defense threat environments, an RPA is the best platform to choose to ensure precision, persistence, flexibility, and minimize civilian casualties.

Asymmetrical Advantage and Enemy Information Operations

Some have criticized the use of "drones" as too easy a way to deliver firepower without risk to American lives. I will conclude with some recently published thoughts by retired Air Force Lieutenant General David Deptula, a brilliant national security and military strategist and the first general to oversee ISR in the USAF, including RPA/UAV/UAS development.

A significant advantage of RPA is that they allow us to project power without projecting vulnerability—something that can't be done when ground forces are put in harm's way. This capability provides us with an asymmetric advantage that our adversaries find difficult to counter. Because RPA are so effective, our enemies try to manipulate us to do what they cannot -- limit the use of one of our asymmetric advantages -- by spreading falsehoods that "drones" cause reckless collateral damage or are somehow not accurate.

The fact of the matter is that "drones" are one of, if not *the* most accurate means of employing significant force in our military arsenal. Airpower, in the form of RPA, is the one allied capability that the Taliban in Afghanistan, Al Qaeda in Pakistan, Yemen, and around the globe cannot defeat directly. By creating international focus on civilian casualties, and attributing those casualties to "drones" vice the biggest cause of those casualties—themselves, they create political and societal pressure to limit the use of "drones." Adversary falsehoods regarding inaccuracy and collateral damage divert attention from the fact that the massive intentional damage, intentional killing of civilians, and intentional violations of international law are being conducted

by Al Qaeda and the Taliban - not U.S. "drones." (<http://defense.aol.com/2013/02/15/retired-gen-deputula-drones-best-weapons-weve-got-for-accurac/>)

Thank you again, Mr. Chairman and Members of the Subcommittee, for the opportunity to testify before you today. I look forward to your questions and discussion.

TESTIMONY

**“Drone Wars: The Constitutional and Counterterrorism
Implications of Targeted Killing”**

**Peter Bergen,
Director of the National Security Studies Program,
New America Foundation**

April 23, 2013

**Testimony presented before the
U.S. Senate Committee on the Judiciary,
Subcommittee on the Constitution, Civil Rights and Human
Rights**

This testimony will attempt to answer a number of key questions about the controversial CIA drone program. It will enumerate the number of strikes the CIA has carried out in both Pakistan and Yemen since 2002 and trace the rising trajectory of the program under the administration of George W. Bush, as well as the dramatic amplification of the program under President Obama. It will also delve into the issue of civilian casualties and the less discussed issue of the number of militant leaders who have been killed in the strikes. It will attempt to assess the impacts the drone program has had on al-Qaeda and the Taliban, and it will examine the expansion of drone programs around the world. Finally, it will assess the effects of the CIA drone strikes on public opinion in Pakistan and in the United States, and suggest a way forward for the CIA drone program.¹

1. A Rapid Rise in Drone Strikes and Deaths

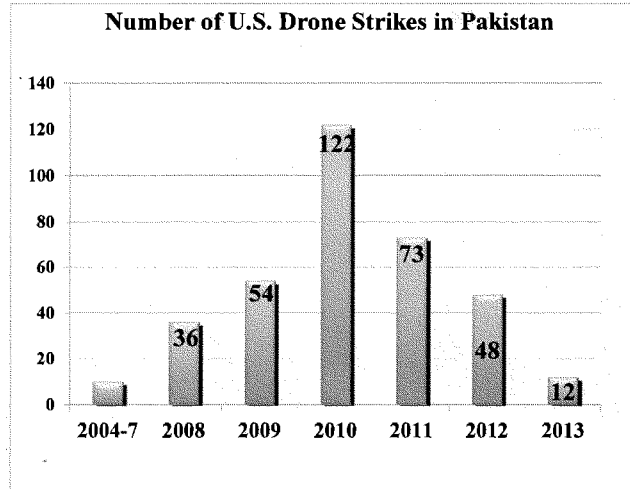
The CIA drone program began quietly under President George W. Bush with one strike in Yemen in 2002, and then a smattering of strikes in Pakistan between 2004 and 2007 before a more sustained campaign in 2008. During his two terms in office, Bush authorized a total of 48 strikes in Pakistan.

Upon taking office in January 2009, President Barack Obama almost immediately made drones one of his key national security tools. By mid-April 2013, he had already authorized 307 strikes in Pakistan, six times more than the number of strikes carried out during President Bush's entire eight years in office. Under Obama, the drone program accelerated from an average of one strike every 40 days to one every 4 days by mid-2011.

Using reports from a variety of reliable news outlets, the New America Foundation—a non-partisan think tank in Washington, D.C.—has calculated that some 2,003 to 3,321 people were killed by drone strikes in Pakistan between 2004 and mid-April 2013. At this point, the number of estimated deaths from the Obama administration's drone strikes in Pakistan—somewhere between 1,614 and 2,765—is more than four times what it was during the Bush administration.² Interestingly, the lowest estimate of deaths from drone strikes in Pakistan under Obama is around double the total number of detainees sent to Guantanamo by Bush.

¹ Thanks to Jennifer Rowland for her help in preparing this testimony.

² <http://counterterrorism.newamerica.net/drones>



The year 2010, with a record 122 strikes in Pakistan, marked the most intense period of the Obama drone campaign in Pakistan. This, combined with the May 2011 raid on Osama bin Laden's compound in Abbottabad and the killing of 24 Pakistani soldiers in a NATO air strike in November 2011, severely damaged the relationship between the United States and Pakistan and resulted in the eviction of CIA-controlled drones from Shamsi Air Base in Baluchistan.³ At the same time, Cameron Munter, the then-U.S. Ambassador to Pakistan, was urging that there be more judicious targeting of the drone strikes as well as increased consultation with the Pakistanis about them.⁴

Some combination of U.S. Department of State pushback, increased congressional oversight, the closure of the CIA drone base in Pakistan (and, perhaps, a declining number of targets in the tribal regions), and a greater desire to heed Pakistani sensitivities about drone attacks led to a sharp fall in the number of strikes in 2011. The number of drone strikes in Pakistan in 2011 fell by 40 percent from the record number of strikes in 2010.

Meanwhile in Yemen, after the first attack in 2002, there were no reported drone strikes until President Obama took office in 2009. Obama vastly accelerated the drone campaign in Yemen, particularly in 2011 and 2012, just as drone strikes in Pakistan began to slow. At least 46 strikes

³ http://www.nytimes.com/2011/12/12/world/asia/cia-leaves-pakistan-base-used-for-drone-strikes.html?_r=1&adxnnl=1&adxnnlx=1346429026-1gsqFC2urQuAzdR9ZA2qJw

⁴ <http://online.wsj.com/article/SB10001424052970204621904577013982672973836.html>

took place in Yemen in 2012, marking the first time the number of drone strikes in Yemen and Pakistan reached comparable levels. As of mid-April 2013, U.S. drone and air strikes have killed an estimated 467 to 674 people in Yemen, all but six of whom were killed under Obama.

2. Who Are the Targets?

Between 2004 and mid-April 2013, the drone campaign in Pakistan has killed 55 militant leaders whose deaths have been confirmed by at least two credible news sources. (A list of those al-Qaeda and Taliban leaders can be found in Appendix A and B, respectively.) While this represents a significant blow to the militant chain of command, these 55 deaths account for only two percent of all drone-related fatalities in Pakistan. Thirty-four leaders have been reported killed in Yemen, representing around six percent of the total casualties resulting from U.S. strikes there.

Given the fact that the CIA drone program first evolved as a measure to kill hard-to-capture al-Qaeda or Taliban leaders, this is a striking finding. The drone program has increasingly evolved into a counterinsurgency air platform, the victims of which are mostly lower-ranking members of the Taliban (Pakistan) and lower-level members of al-Qaeda and associated groups (Yemen). In 2010, a militant told a *New York Times* reporter, “It seems they really want to kill everyone, not just the leaders.”⁵

In September 2012, President Obama told CNN that drone strikes were only used in “[situations] in which we can’t capture the individual before they move forward on some sort of operational plot against the United States.” Clearly the threshold to mount drone strikes is far lower than this standard would suggest given the fact that overwhelmingly the victims of the strikes are lower-level militants who do not have the capacity to plot effectively against the United States.

Under Bush, about a third of all drone strikes in Pakistan killed a militant leader compared to less than 13 percent from the time Obama took office to mid-April 2013. While Bush sought to decapitate the leadership ranks of al-Qaeda, Obama seems to be aiming to collapse the entire network of allied groups, such as Tehrik-i-Taliban Pakistan (TTP), the Pakistani Taliban. As a result, so-called “signature strikes” have become a hallmark of Obama’s drone war.⁶ These are drone attacks based merely on patterns of suspicious activity by a group of men, rather than the identification of particular militants. They have decimated the ranks of lower-level combatants, killing somewhere between 1,558 and 2,700 reported militants in Pakistan as of mid-April 2013.

During the Bush administration, the drone campaign appeared to put emphasis on killing significant members of al-Qaeda but under Obama, it underwent a quiet and largely unheralded

⁵ http://www.nytimes.com/2010/04/05/world/asia/05drones.html?_r=1

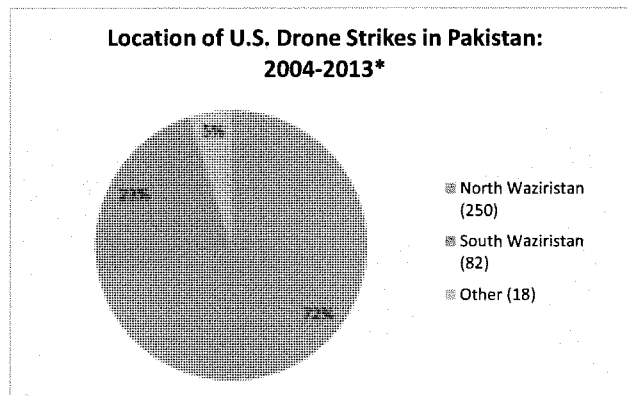
⁶ <http://www.nytimes.com/2012/04/26/world/middleeast/us-to-step-up-drone-strikes-inside-yemen.html>

shift to focus increasingly on killing Taliban foot soldiers. To the extent that the targets of drone attacks can be ascertained, under Bush, al-Qaeda members were killed or identified as the likely target for 25 percent of all drone strikes, compared to 40 percent for the Taliban. Under Obama, only 10 percent of targets appear to be al-Qaeda militants, compared to just over 40 percent for the Taliban.

Early in his administration, President Obama took it upon himself to act as the chief decision-maker on whether individuals were added to the U.S. drone “kill list” or not. He would reportedly gather with a small group of his top national security advisors every Tuesday to pour over intelligence gathered on suggested new targets, “determined to keep the tether [on the drone program] pretty short,” according to National Security Advisor Thomas Donilon.⁷ It was reported in October 2012 that the administration had been working for at least two years on a secret “disposition matrix” to replace the “kill list.” With the matrix, officials sought to lay out all of the U.S. resources being used to track down and build a case against terrorist suspects who may be either in the reach of drones or outside established drone theaters.⁸

3. Where are the Targets?

Geographically speaking, of all the U.S. drone strikes reported in Pakistan’s tribal regions, over 70 percent have struck North Waziristan, home to factions of the Pakistani Taliban and the Haqqani Network, which has often launched operations in Kabul against civilian targets.



*As of April 19, 2013

⁷ <http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-Qaeda.html?pagewanted=all>

⁸ http://articles.washingtonpost.com/2012-10-23/world/35500278_1_drone-campaign-obama-administration-matrix

Over a third of the strikes in North Waziristan have reportedly targeted members of the Taliban, with at least 10 of the strikes killing senior Taliban commanders, as well as hundreds of lower-level fighters.

It is interesting to note that of the more than 350 drone strikes the CIA has mounted in Pakistan over the past nine years, none have occurred outside of Pakistan's tribal areas. The extension of the drone program to the "settled" areas of northwest Pakistan or Baluchistan is highly unlikely, as it would cause very significant problems for the ever-fragile U.S.-Pakistan relationship. (The one exception to this might be a drone strike targeting Ayman al Zawahiri, the current leader of al-Qaeda. A drone strike using a small experiment bomb was one of the options considered by President Obama and his national security advisers in the spring of 2011 as they contemplated what to do about the intelligence that bin Laden might be living in a compound in Abbottabad).

4. Civilian and Other Casualties

The U.S. drone campaign became increasingly controversial as it ramped up under President Obama and captured more of the public's interest. Many human rights activists claim that a substantial number of civilians are killed in the attacks, while Obama administration officials, including the president's top counterterrorism advisor John Brennan, said publicly in 2011 that there were no civilian casualties as a result of the strikes.⁹

According to data generated by the New America Foundation, by averaging the high and low casualty estimates of militant and non-militant deaths published in a wide range of reliable media outlets, the estimated civilian death rate in U.S. drone strikes in Pakistan has declined dramatically since 2006, when—due to two large-scale strikes—it was almost 100%.

U.S. government officials have asserted that the civilian casualty rate is zero. And it has been reported that the Obama administration considers any military-age male in the strike target area as a "militant".¹⁰ The New America data is not based on the U.S. official definition of a militant and does not rely on any U.S. official counting of the strikes. Rather, New America records as a militant only those people identified in credible news reports as a militant or a "suspected militant." The media outlets used by New America in its database of drone strikes are the *Associated Press*, *Reuters*, and *Agence France Presse*; *The New York Times*, *The Washington Post*, *The Los Angeles Times*, and *The Wall Street Journal*; the British newspapers *The Telegraph* and *The Guardian*; and the Pakistani news outlets *The Express Tribune*, *Dawn*, *The Daily Times*, *Geo TV*, and *The News*; as well as the BBC and CNN. The majority of these sources get information on CIA drone strikes in Pakistan from Pakistani intelligence, security, and local government officials, as well as local villagers.

⁹ <http://www.nytimes.com/2011/08/12/world/asia/12drones.html?pagewanted=all>

¹⁰ http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-Qaeda.html?pagewanted=all&_r=1&_hpid=hp_terrorism%3Aobamas-leadership-in-war-on-al-Qaeda%3Ahomepage%2Ft-top&_hpt=hp_terrorism%3Aobamas-leadership-in-war-on-al-Qaeda%3Ahomepage%2Ft-top

The New America Foundation's casualty counts also differentiate between individuals identified as "militants" and those identified as "civilians." The murkiness of some reporting in the tribal regions of Pakistan and in Yemen led New America researchers to designate another category for "unknown" casualties. If two or more media reports refer to those killed as militants, they are labeled as militants in the New America data. Similarly, if two or more media reports refer to those killed as civilians, they go under the civilian column in the New America database. And if the different media reports on a single strike are so contradictory that researchers do not feel comfortable placing either label on those killed, they are listed as "unknown."¹¹

Over the life of the drone program in Pakistan, the estimated non-militant (civilian and unknown) death rate is 20 percent according to the New America data. Under President Bush, it was about 47 percent while under President Obama it has been about 16 percent. In 2012, the proportion of total civilians (2 percent) and unknowns (9 percent) killed was 11 percent. The New America data shows that between 454 and 637 non-militant (civilian and unknown) individuals were killed by U.S. drone strikes in Pakistan between 2004 and mid-April 2013. New America estimates that the confirmed number of Pakistani civilians who have been killed by drone strikes during the same time frames is between 258 to 307, or 10.6 percent of the total number of casualties.

Estimated Total Deaths from U.S. Drone Strikes
in Pakistan, 2004 - 2013*

Year	Militant Low	Militant High	Unknown Low	Unknown High	Civilian Low	Civilian High	Total Low	Total High
2013	44	53	3	5	0	0	47	58
2012	197	317	19	31	5	5	221	349
2011	304	488	31	36	56	64	367	600
2010	555	960	38	50	16	21	611	1,028
2009	241	508	44	136	66	80	354	721
2008	157	265	49	54	23	28	229	347
2004- 2007	43	76	16	18	95	107	155	200
Total	1,588	2,700	200	330	261	305	2,003	3,321

*As of April 19, 2013

¹¹ <http://counterterrorism.newamerica.net/drones/methodology>

The London-based Bureau of Investigative Journalism (BIJ) and the D.C.-based Long War Journal also maintain counts of drone casualties in Pakistan. BIJ reports that between 411 and 884 Pakistani civilians have been killed in U.S. drone strikes, representing 16 to 25 percent of the total casualties BIJ has counted. On the low end, the Long War Journal reports that 153 Pakistani civilians have been killed, representing just 5.8 percent of the 2,660 deaths it has recorded over the life of the drone campaign.

All three databases report relatively low civilian casualty figures for 2012: New America reported 5 (as well as 23 to 29 unknowns), BIJ reported 7 to 42 civilian deaths, and the Long War Journal reported 4.

In March 2013, following a visit to Pakistan, Ben Emmerson, the U.N. special rapporteur on human rights and counter-terrorism, emailed the *Associated Press* that the Pakistani government had told him it had confirmed at least 400 civilian deaths by U.S. drones. This number is in the range of the low estimate of 411 civilian deaths by the BIJ and also computes with the New America figures estimating between 258 and 307 civilians and a further 196 to 330 unknowns have been killed.

All of these estimations, however, are far below the civilian death rate that some Pakistani officials and private research groups such as Pakistan Body Count have claimed in the past. According to a report from *Dawn*, one of Pakistan's leading English-language newspapers, Pakistani authorities in 2010 estimated that for every militant killed in a drone strike in 2009, 140 Pakistani civilians also died, and that the civilian casualty rate for that year was more than 90 percent.¹² And the Pakistan Body Count's ongoing tally estimates the civilian casualty rate over the life of the drone campaign to be between 75 percent and 80 percent.¹³

However, Pakistani security officials acknowledged during background interviews with the *Washington Post* in mid-2010 that, in fact, better technology, a deeper network of on-the-ground informants, and better coordination between U.S. and Pakistani intelligence officials had all contributed to a significant drop in civilian deaths in drone strikes.¹⁴ And Major General Ghayur Mahmood, a commander of Pakistani troops in North Waziristan where the majority of drone strikes take place, conceded publicly in March 2011 that "myths and rumors about U.S. Predator strikes and the casualty figures are many, but it's a reality that many of those killed in these strikes are hardcore elements, a sizeable number of them foreigners."¹⁵ The general went on to say that drone strikes had killed some one thousand militants in North Waziristan.

¹² <http://archives.dawn.com/archives/144960>

¹³ http://pakistanbodycount.org/drone_attack

¹⁴ <http://www.washingtonpost.com/wp-dyn/content/article/2010/04/25/AR2010042503114.html>

¹⁵ <http://dawn.com/2011/03/09/most-of-those-killed-in-drone-attacks-were-terrorists-military/>

The drop in the number of civilian and unknown casualties in Pakistan since 2009 came as a result of several developments, one of which was a directive issued from the White House just days after President Obama took office tightening up the way the CIA selected targets and carried out strikes. Specifically, Obama wanted to evaluate and personally sign off on any strike if the agency did not have a "near certainty" that it would result in zero civilian casualties. The CIA also began utilizing smaller munitions for more pinpoint strikes.¹⁶ Also drones can now linger for longer periods of time over targets—ascertaining whether civilians are around the target area—than was the case several years ago.

Additionally, the drone program has come under increasing congressional oversight in the past couple of years, a layer of accountability that one former CIA official said was unheard of when he left the agency in 2009.¹⁷ Since early 2010, members of the Senate and House intelligence committees have held monthly meetings at CIA headquarters to watch video recordings of specific drone strikes, as well as to review the intelligence upon which CIA agents on the ground in Pakistan based their target selection.

5. The Impact of Drones on Militant Groups

Osama bin Laden himself recognized the devastation that the drones were inflicting on his organization, writing a lengthy memo about the issue that was later recovered in the Abbottabad compound where he was killed. In the October 2010 memo to a lieutenant, bin Laden advised his men to leave the Pakistani tribal regions, where the drone strikes have been overwhelmingly concentrated, and head to a remote part of Afghanistan. He also suggested that his son Hamza decamp for the tiny, rich Persian Gulf kingdom of Qatar.¹⁸

Evidence of the drone strikes' impact can be found in the description provided by David Rohde, the former *New York Times* reporter held by the Taliban Haqqani Network for months in 2009, who called the drones "a terrifying presence" in South Waziristan. Key Taliban commanders reportedly started sleeping outside under trees to avoid being targeted and regularly executed suspected "spies" accused of providing information to the United States, suggesting they feared betrayal from within.

The drone attacks in Pakistan have undoubtedly hindered some of the Taliban's operations and killed hundreds of their lower-level fighters and a number of their top commanders. Conversely, the CIA strikes may also be fueling terrorism. Faisal Shahzad, an American citizen of Pakistani descent trained by the Pakistani Taliban, tried to detonate a car bomb in Times Square on May 1,

¹⁶ <http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-Qaeda.html>

¹⁷ <http://www.latimes.com/news/nationworld/world/middleeast/la-na-drone-oversight-20120625.0.7967691.full.story>

¹⁸ http://articles.cnn.com/2012-03-16/opinion/opinion_bergen-bin-laden-final-writings_1_drone-strikes-year-bin-bin-laden?_s=PM:OPINION

2010. The plot failed, but Shahzad subsequently claimed that the drone program had fueled his anger against the United States.

6. Evolution of Public Opinion

Beginning in 2012, Pakistani officials rarely based their criticism of U.S. drone strikes on the incidence of civilian casualties and have instead pointed, quite reasonably, to another objection: the U.S. violation of Pakistan's national sovereignty. The Pakistani parliament voted in April 2012 to end any authorization for the program, a vote that the United States government has ignored.

This may be because despite their public protests, some senior Pakistani officials such as President Asif Ali Zardari privately support the drone strikes. In a 2008 State Department cable that was made public by WikiLeaks, Zardari signed off on the drone program in a discussion with U.S. officials saying, "Kill the seniors. Collateral damage worries you Americans. It does not worry me."

Further confirmation of official Pakistani support for the strikes came in mid-April 2013 when Pakistan's former president Pervez Musharraf acknowledged to CNN that his government had secretly signed off on U.S. drone strikes, the first public admission by a senior Pakistani official to such a deal. Musharraf claimed that Pakistan's government signed off on those strikes "only on a few occasions, when a target was absolutely isolated and no chance of collateral damage."

Even though in recent years fewer civilians have been killed by drone strikes, the program remains deeply unpopular within the Pakistani public.¹⁹ During the summer of 2010, the New America Foundation sponsored one of the few public opinion polls ever to be conducted in Pakistan's Federally Administered Tribal Areas (FATA) and found that almost 90 percent of the respondents opposed U.S. military operations in the region.²⁰ A Pew poll conducted in June 2012 found that just 17 percent of Pakistanis support the U.S. conducting drone strikes to help combat militancy in their country.

A poll of 21 countries in 2012 also found widespread global opposition to the CIA drone program. Muslim countries such as Egypt (89 percent) and Jordan (85 percent) expressed high levels of disapproval, while non-Muslim countries that are close American allies also registered significant displeasure with the program—Germany and France respectively polled at 59 and 63 percent disapproval.

¹⁹ <http://www.nytimes.com/2012/04/13/world/asia/pakistan-demands-an-end-to-cia-drone-strikes.html>

²⁰ <http://pakistansurvey.org/>

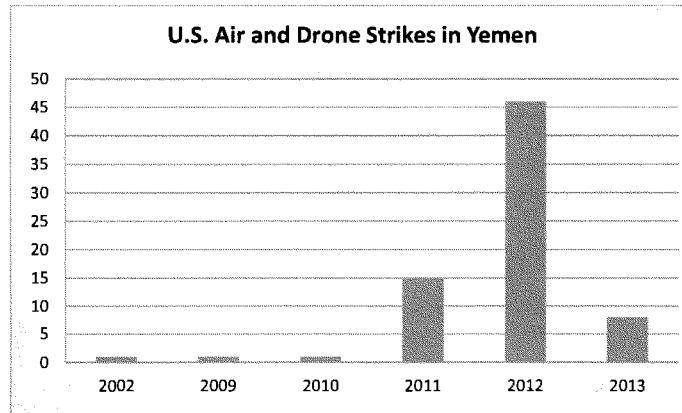
Meanwhile in the United States, the drone program has enjoyed widespread support. In a February 2013 Pew Research Center poll, 56 percent of Americans said they approve of lethal drone attacks in countries such as Pakistan, Yemen, and Somalia.²¹ This is hardly surprising as the human, financial and political costs of the drone program are very low. There are no American boots on the ground and a drone costs a tiny fraction of the costs of deploying fighter aircraft or bombers.

7. The Drone Campaign in Yemen

The CIA inaugurated the lethal drone program in Yemen on November 3, 2002, with a Hellfire missile launched from a Predator drone at a vehicle in the province of Maarib, about 100 miles east of the capital city of Sana'a. The attack killed al-Qaeda's top operative in Yemen, Qaed Salim Sinan al-Harethi, who was also a suspect in the 2000 bombing of the USS *Cole* off the Yemeni coast. In the car with al-Harethi were five other militants, all of whom were killed, including U.S. citizen Kamal Derwish. He was the first reported American casualty in the CIA's drone campaign. After the 2002 U.S. drone strike, there were no reported U.S. air or drone strikes in Yemen until December 2009, when a sustained campaign of attacks began. That change came when al-Qaeda's Yemen-based affiliate, al-Qaeda in the Arabian Peninsula (AQAP), attempted a number of terrorist attacks against the United States.

While the drone campaign in Pakistan was on the wane between 2011 and 2013, it simultaneously ramped up against the al-Qaeda affiliate in Yemen. In 2012 alone, Obama authorized at least 46 drone strikes in Yemen, while Bush only launched one drone attack there during his entire two terms in office, according to data compiled by the New America Foundation.

²¹ <http://www.people-press.org/2013/02/11/continued-support-for-u-s-drone-strikes/>



*As of April 19, 2013

As of mid-April 2013, U.S. air and drone strikes had killed an estimated 427 to 679 people in Yemen, 439 to 583 of whom were identified in media reports as militants, according to the New America Foundation's data.²² That data is derived from reports in the *Associated Press*, *Reuters*, *CNN*, and the *Yemen Post*. Of these deaths, all but six occurred during Obama's presidency. The non-militant casualty rate from these strikes is estimated to be between 7 percent and 14 percent, roughly comparable with the civilian and unknown casualty rate from the U.S. drone program in Pakistan, which averaged 11 percent in 2012, according to New America Foundation data.

Counting drone attacks and airstrikes in Yemen, however, is perhaps even more complicated than in Pakistan because it has often been unclear whether attacks were launched from drones or from fighter jets, and villagers regularly provide conflicting accounts of the kinds of aircraft used in these attacks. To make data collection on these strikes even more difficult, diplomatic cables released by WikiLeaks revealed that the Yemeni government has sometimes taken credit for airstrikes that were in fact being carried out by the United States. According to one cable, then-Yemeni President Ali Abdullah Saleh told then-CENTCOM Commander General David Petraeus in January 2010, "We'll continue saying the bombs are ours, not yours," after which Deputy Prime Minister Rashad al-Alimi joked that he had just "lied" to the Yemeni Parliament about the American role in such strikes.²³

²² <http://vemendrones.newamerica.net/>

²³ <http://www.guardian.co.uk/world/2010/dec/03/wikileaks-yemen-us-attack-al-qaida>

After the longtime Yemeni strongman Saleh stepped down in February 2012, the American drone strikes and airstrikes increased. From March through May 2012, the United States launched an estimated 23 air and drone strikes in Yemen. By comparison, there were just 18 attacks in the previous two years.

During the Obama administration, U.S. drones have killed at least 34 key al-Qaeda militants in Yemen, including the Yemeni-American cleric Anwar al-Awlaki and Fahd al-Quso, who was suspected of involvement in the 2000 bombing of the USS *Cole*.²⁴ The death of AQAP's senior leader Said al-Shihri from wounds sustained in a U.S. drone strike in October 2012 dealt the organization an important blow.²⁵ (A list of the AQAP leaders who have been killed by drones can be found in Appendix C). AQAP hasn't attempted a plot against a Western target since its attempt to bring down US-bound cargo planes in October 2010, and the group has lost control of the string of towns in southern Yemen it held in 2011.

Balanced against this is the fact that some of the popular resentment toward the U.S. drone campaign that has long been the case in Pakistan is beginning to emerge in Yemen where small demonstrations by local tribesmen have occurred. The drone program in Yemen is also stirring some of the same international controversy that the strikes in Pakistan have done for years. Human rights groups in the United States are particularly aggrieved by the targeted killing of al-Awlaki, an American citizen who was killed by a drone on September 30, 2011, as was his teenage son.

Unlike Pakistan, where political leaders have almost universally—at least in public—condemned the strikes, Yemeni President Abed Rabbo Mansour Hadi said during an interview with the *Washington Post* in September 2012 that he personally signs off on all U.S. drone strikes in Yemen and that they hit their targets accurately, asserting, "The drone technologically is more advanced than the human brain."

8. The US Government Begins to Open Up About Drones.

President Obama made his first public comments about the covert drone program on January 30, 2012, when he told participants of a Google+ Hangout that the United States only conducts "very precise, precision strikes against al-Qaeda and their affiliates, and we're very careful in terms of how it's been applied."²⁶ The administration also maintains that international law does not prohibit the use of lethal force against an active enemy "when the country involved consents or is unable or unwilling to take action against the threat."²⁷ Many U.S. officials have argued that the

²⁴ <http://www.cnn.com/2011/09/30/world/meast/analysis-anwar-al-awlaki/index.html>

²⁵ http://www.huffingtonpost.com/2013/01/24/saeed-al-shihri-dead_n_2545067.html

²⁶ <http://content.usatoday.com/communities/theoval/post/2012/01/obama-defends-drone-strikes/1>

²⁷ <http://www.cnn.com/2013/02/07/us/drones-classified-document/index.html>

unprecedented precision of drones makes them by far the most effective weapon for striking a target and for avoiding civilian casualties.

Critics of the drone program—both in the public and the government—have long called for the process of choosing drone targets to be more transparent, for casualty counts to be made public, and for leaders to be held accountable for the strikes.²⁸ In mid-February 2013, Brennan himself said in written responses to questions from Chairwoman Feinstein that he believes the government should publicize civilian casualty counts from drone strikes. Brennan also said in those responses that “in those rare instances in which civilians have been killed,” the CIA conducts investigations and provides monetary compensation to the families of victims when appropriate.²⁹

Additionally, calls for the military to take control of the CIA’s drone program began to grow. In an early February 2013 interview with NBC, then-Secretary of Defense Panetta voiced some support for such a transition, which would allow for more transparency on U.S. procedures for identifying targets and conducting strikes.³⁰ Officials close to Brennan said later that month that he too supports moving the bulk of the program to the military’s jurisdiction.³¹ Meanwhile, in early 2013, the Obama administration was expected to receive a draft of a “playbook” codifying the policies developed during its first term to govern the use of drones for targeted killing operations. Drone attacks in Pakistan would reportedly be exempt from this document, allowing the CIA to continue the current program without complying with any new requirements for at least another year.³²

As media coverage and discussion of U.S. drone strikes have proliferated, the U.S. government has become more candid about the program, its legal basis, and its procedures. Members of the Senate Intelligence Committee grilled Brennan, President Obama’s nominee as director of the CIA, about drone strikes at his confirmation hearing in February 2013, the first time officials had sparred publicly over the covert program. And just days before the hearing, a Justice Department memo summarizing the legal basis for killing U.S. citizens in drone strikes abroad was leaked, sparking a flurry of discussion over the administration’s secret decisions and possible abuse of executive power.

9. A World of Drones

A decade ago, the United States had a virtual monopoly on drones. Not anymore. According to data compiled by the New America Foundation, more than 70 countries now own some type of

²⁸ <http://www.foxnews.com/politics/2013/02/10/lawmakers-urge-oversight-us-drone-program/>

²⁹ <http://www.reuters.com/article/2013/02/15/us-obama-nominations-brennan-drones-idUSBRE91E18N20130215>

³⁰ <http://presspass.nbcnews.com/news/2013/02/03/16819717-press-pass-leon-panetta?lite>

³¹ <http://articles.latimes.com/2013/feb/17/nation/la-na-targeted-killing-20130217>

³² http://articles.washingtonpost.com/2013-01-19/world/36474007_1_drone-strikes-cia-director-playbook

drone, though just a small number of those nations possess armed drone aircraft. This explosion in drone technology promises to change the way nations conduct war and threatens to begin a new arms race as governments scramble to counterbalance their adversaries.

In August 2010, Iran unveiled what it claimed was its first armed drone. And on Tuesday, the country's military chief, General Amir Ali Hajizadeh, disclosed details of a new long-range drone that he said could fly 2,000 kilometers (1,250 miles), putting Tel Aviv easily in range. And China took the United States by surprise at the 2010 Zhuhai Air Show when it unveiled 25 drone models, some of which were outfitted with the capability to fire missiles. It remains unclear just how many of China's drones are operational and how many of them are still in development, but China is intent on catching up with the United States' rapidly expanding drone arsenal.

When President George W. Bush declared a "War on Terror" 11 years ago, the Pentagon had fewer than 50 drones. Now, it has around 7,500. As Bush embarked on that war, the United States had never used armed drones in combat. The first U.S. armed drone attack, which appears to be the first such strike ever, took place in Afghanistan in mid-November 2001 and killed Mohammed Atef, the military commander of al-Qaeda.

Only the United States, the United Kingdom, and Israel are known to have launched drone strikes against their adversaries, although other members of the International Security Assistance Force in Afghanistan, such as Australia, have "borrowed" drones from Israel for use in the war there.

Drone technology is proliferating rapidly. A 2011 study estimated that there were around 680 active drone development programs run by governments, companies, and research institutes around the world, compared with just 195 in 2005. In 2010, U.S.-based drone developer General Atomics received export licenses to sell unarmed versions of the Predator drone to Egypt, Morocco, Saudi Arabia, and the United Arab Emirates. And in March 2012, the U.S. government agreed to arm Italy's six Reaper drones but rejected a request from Turkey to purchase armed Predator drones. An official in Turkey's Defense Ministry said in July 2012 that Turkey planned to arm its own domestically produced drone, the Anka.

Israel is the world's largest exporter of drones and drone technology, and the state-owned Israeli Aerospace Industries has sold the platforms to countries as varied as Mexico, Nigeria, and Russia. Building drones, particularly armed drones, takes sophisticated technology and specific weaponry, but as armed drones are increasingly seen as an integral part of modern warfare, governments are increasingly willing to invest the necessary time and money to either buy or develop them. France, Greece, Italy, Spain, Sweden, and Switzerland are working on a joint project through state-owned aeronautical companies and are in the final stages of developing an advanced armed drone prototype called the Dassault nEURon, from which France plans to derive armed drones for its air force. And Pakistani authorities have long tried to persuade the United

States to give them armed Predator drones, while India owns an armed Israeli drone designed to detect and destroy enemy radar, though it does not yet have drones capable of striking other targets.

The Teal Group, a defense-consulting firm in Virginia, estimated in June 2012 that the global market for the research, development, and procurement of armed drones would just about double in the next decade from \$6.6 billion to \$11.4 billion.

States are not alone in their quest for drones. Insurgent groups are also moving to acquire this technology. In 2011, Libyan opposition forces trying to overthrow the dictator Moammar Gadhafi bought a sophisticated surveillance drone from a Canadian company for which they paid in the low six figures. As drone technology becomes more widely accessible, it is only a matter of time before well-financed drug cartels acquire them. And one can easily imagine a day in the not too distant future where armed drones are used to settle personal vendettas. Given the relatively low costs of drones—already far cheaper than the costs of a fighter jet and of training a fighter jet pilot—armed drones will play a key role in future conflicts.

10. Conclusion

As of early 2013, the drone campaign was no longer Washington's worst kept secret; it was, for all intents and purposes, out in the open. This new openness is a good thing. As U.S. Supreme Court Justice Louis Brandeis observed a century ago, "Sunlight is the best disinfectant." Key questions that need to be considered publicly include:

- To what extent has the tactic of using drone strikes overwhelmed the broader strategic objectives of the United States? For instance, have the hundreds of drone strikes in Pakistan all really been necessary? If the cost of the drone program in Pakistan, whose victims are largely lower-level members of the Taliban, is the increasingly hostile view of the U.S. now prevalent among the 180 million citizens of Pakistan—a country with nuclear weapons and the second largest Muslim country in the world—is that cost too high?
- Has the increased emphasis at the CIA on targeted killings hampered the agency's ability to understand really important political developments in the Muslim world, such as the Arab Spring? As a senior Obama official has noted: "The CIA missed Tunisia. They missed Egypt. They missed Libya." Even after the Egyptian revolution occurred, the CIA appears to have entirely missed the fact that the ultra-fundamentalist Salafists would do very well at the election box, winning around quarter of the votes in the 2011 parliamentary election, making them the second largest political bloc in Egypt after the Muslim Brotherhood.

- Is the United States setting a dangerous precedent for other nations with its aggressive and secretive drone programs in Pakistan and Yemen? Just as the U.S. government justifies its drone strikes with the argument that it is at war with al-Qaeda and its affiliates, one could imagine a Chinese strike against Uighur separatists in western China or an Iranian attack on Baluchi nationalists along its border with Pakistan. The rules and regulations the U.S. government places on its use of drones as targeted killing machines will decide whether future U.S. leaders will be able to call on other countries to self-impose similar limitations. A failure to stand up a transparent, accountable structure within which drone targets are chosen, collateral damage decisions are made, and post-hoc evaluations are held could have important ramifications should countries like China and Russia cite U.S. precedents if using armed drones against individuals or groups they consider to be terrorists.
- Should there be an international framework governing the use of drone attacks? The time has come for some kind of international convention on the legal framework surrounding the uses of such weapons, which promise to shape the future of warfare as much as tanks and aerial bombers did during the 20th century. Yet so far, there has been virtually no substantive public discussion about drone attacks among policymakers at the international level.
- Should Washington transfer responsibility for the drones flying over Pakistan from the CIA to the U.S. military? The CIA's control of the program in Pakistan is more a legacy of its longtime dominance of operations targeting al-Qaeda than a reflection of any special expertise in drone warfare, and military control would have several advantages. In Afghanistan, where U.S. drone programs are already controlled by the Pentagon, U.S. military lawyers ensure that the strikes conform to the laws of war. In Pakistan, whatever vetting process the CIA observes remains largely opaque. In Afghanistan, the U.S. military also tends to pay compensation for accidental civilian deaths, whereas Pakistani civilians in the tribal areas can seek little legal or material recourse from the United States when their relatives are slain. Military control of the drone program in Pakistan would also place the strikes more clearly in the chain of command and link U.S. actions in eastern Afghanistan more directly with those in Pakistan's tribal regions. Coordinated Afghan-U.S. military operations now give the Afghan government more ownership over security conditions in Afghanistan. A similar arrangement should be struck in Pakistan.

Note: Attached to this statement are appendices that detail the names of the leaders of al Qaeda and the Taliban who have been killed in drone strikes in Pakistan as well as the leaders of al Qaeda in Yemen who have also been killed by drones.

Appendix A

This is a list of the 37 al-Qaeda and affiliated group leaders who have been killed in the CIA drone campaign in Pakistan.

May 18, 2005: Haitham al-Yemeni, an al-Qaeda explosives expert

December 1, 2005: Abu Hamza Rabia, a top al-Qaeda official

January 29, 2008: Abu Laith al-Libi, described as the then-“Number Three” man in al-Qaeda who orchestrated a 2007 suicide attack targeting then-Vice President Dick Cheney while he was visiting Bagram Airfield

May 14, 2008: Abu Sulayman Jazairi, an Algerian al-Qaeda planner

July 28, 2008: Abu Khabab al-Masri, al-Qaeda’s WMD expert

September 4, 2008: Abu Wafa Al Saudi, an al-Qaeda commander and logistician

September 8, 2008: Abu Haris, al-Qaeda’s chief in Pakistan

October 2008 (exact date unknown): Abu Hassan al-Rimi, an al-Qaeda “emir” who led cross-border operations against coalition forces in Afghanistan

October 16, 2008: Khalib Habib, a senior member of al-Qaeda

October 31, 2008: Mohammad Hasan Khalil al-Hakim—also known as Abu Jihad al-Masri—al-Qaeda’s propaganda chief

November 19, 2008: Abdullah Azzam Al Saudi, a senior member of al-Qaeda

November 22, 2008: Abu Zubair al-Masri, a senior member of al-Qaeda

2009 (exact date unknown): Saad bin Laden, Osama bin Laden's second eldest son whose death was confirmed by documents found in the Abbottabad compound

January 1, 2009: Osama al-Kini, al-Qaeda's then-chief of operations in Pakistan who also played a central role in the 1998 bombings of U.S. embassies in Kenya and Tanzania

January 1, 2009: Sheikh Ahmed Salim Swedan, al-Kini's lieutenant who also played a role in the 1998 embassy bombings

April 29, 2009: Abu Sulayman al-Jazairi, an Algerian al-Qaeda planner who American intelligence officials believe helped train operatives for attacks in Europe and the United States [no relation to the Abu Sulayman al-Jazairi killed on May 14, 2008]

September 14, 2009: Nazimuddin Zalalov—also known as Yahyo—a leader of the Islamic Jihad Union and a bin Laden lieutenant

December 8, 2009: Saleh al-Somali, al-Qaeda's external operations chief and the link between al-Qaeda in Afghanistan and Pakistan and al-Qaeda abroad

December 17, 2009: Zuhaib al-Zahibi, a well-known al-Qaeda commander in North Waziristan

February 15, 2010: Abdul Haq al-Turkistani, an al-Qaeda-linked leader of the Turkistani Islamic Party

February 17, 2010: Sheikh Mansoor, an Egyptian-Canadian al-Qaeda leader

March 8, 2010: Sadam Hussein Al Hussami—also known as Ghazwan al-Yemeni—an al-Qaeda planner and explosives expert with contacts in AQAP, the Afghan Taliban, and TTP

May 21, 2010: Mustafa Abu al-Yazif, al-Qaeda's then-"Number Three"

September 26, 2010: Sheikh al-Fateh, an al-Qaeda chief in Afghanistan and Pakistan

June 3, 2011: Ilyas Kashmiri, a senior al-Qaeda commander in Pakistan

August 22, 2011: Atiyah Abd al-Rahman, al-Qaeda's then-"Number Two"

September 11, 2011: Abu Hafs al-Shahri, then-al-Qaeda's chief of operations in Pakistan

January 10, 2012: Aslam Awan, a senior al-Qaeda operations organizer in Abbottabad

February 9, 2012: Badar Mansoor, thought to be al-Qaeda's most senior leader in Pakistan

June 4, 2012: Abu Yahya al-Libi, al-Qaeda's then-"Number Two"

August 21, 2012: Badruddin Haqqani, commander of military operations and third-in-command for the Haqqani Network

September 24, 2012: Abu Akash al-Iraqi, a senior al-Qaeda operative

September 24, 2012: Seleh al-Turki, a mid-level al-Qaeda operative

October 11, 2012: Maulana Shakirullah, the commander of TTP's Hafiz Gul Bahadur group

October 11, 2012: Umar Haqqani, a Taliban commander in the Punjab region of Pakistan

December 1, 2012: Abdul Rehman al-Zaman Yemeni, an al-Qaeda operative said to have had links to bin Laden

December 6, 2012: Abdel Rehman al-Hussainan—also known as Abu Zaid al-Kuwaiti—a senior member of al-Qaeda

Appendix B

This is a list of the 18 Taliban leaders who have been killed in the CIA drone campaign in Pakistan.

June 18, 2004: Nek Mohammad, a Taliban leader

August 13, 2008: Abdul Rehman, a Taliban commander in South Waziristan

October 26, 2008: Mohammad Omar, a close associate of Nek Mohammad

August 5, 2009: Baitullah Mehsud, the overall leader of TTP

December 31, 2009: Haji Omar, a key Taliban commander in North Waziristan

January 2010 (exact date unknown): Mahmud Mahdi Zeidan, a Taliban commander from Jordan

February 24, 2010: Mohammad Qari Zafar, a Taliban commander wanted in connection with the March 2006 bombing of the U.S. Consulate in Karachi

December 17, 2010: Ali Marjan, a local commander of Lashkar-e-Islam

October 27, 2011: Khan Mohammad, one of TTP commander Maulvi Nazir's deputies

October 27, 2011: Hazrat Omar, Maulvi Nazir's younger brother

October 27, 2011: Ashfaq Wazir, a Taliban commander

October 27, 2011: Miraj Wazir, a Taliban commander

March 13, 2012: Amir Hamza Toji Khel, one of Maulvi Nazir's senior commanders

March 13, 2012: Shamsullah, one of Maulvi Nazir's senior commanders

January 2, 2013: Maulvi Nazir—also known as Maulvi Nazir Wazir—the TTP leader in South Waziristan

January 2, 2013: Ratta Khan, one of Maulvi Nazir's deputies

January 3, 2013: Shah Faisal, a militant commander under current TTP leader Hakimullah Mehsud

January 6, 2013: Wali Mohammad Toofan, head of the TTP's suicide wing

Appendix C

This is a list of the 35 key al-Qaeda militants who have been killed in U.S. drone attacks in Yemen since 2002.

November 3, 2002: Qaed Salim Sunian al-Harithi, al-Qaeda's chief operative in Yemen and a suspect in the October 2000 bombing of the USS *Cole*

January 15, 2010: Qassem al-Raymi, a top military chief for AQAP

January 15, 2010: Ayed Al Shabwani, AQAP's chief of operations in Maarib Province

January 15, 2010: Ammar al-Waeli, an al-Qaeda arms dealer who was accused of involvement in a July 2007 suicide bombing that killed eight Spanish tourists and two Yemenis

January 15, 2010: Abu Ayman, an Egyptian militant who was believed to have spent time in Afghanistan

March 14, 2010: Jamil Nasser Abdullah al-Ambari, who was believed to be the leader of al-Qaeda in southern Abyan Province

July 14, 2011: Hadi Mohammad Ali, a militant commander in Abyan Province

August 1, 2011: Naser al-Shadadi, a leading al-Qaeda militant

September 30, 2011: Anwar al-Awlaki, a radical Yemeni-American cleric

September 30, 2011: Samir Khan, the Pakistani-American founder and editor of AQAP's English-language magazine *Inspire*

October 14, 2011: Ibrahim al-Bana—also known as Abu Ayman al Masri—AQAP's media chief

December 23, 2011: Abdulrahman al-Wuhayshi, a brother of AQAP leader Nasser al-Wuhayshi

March 9, 2012: Abdulwahhab al-Homaiqani, a local AQAP leader in Bayda Province

March 13, 2012: Nasser al-Zafari, a local AQAP leader in Bayda Province

April 22, 2012: Mohammed al-Umda, the fourth most-wanted al-Qaeda militant in Yemen; he was convicted in 2005 of a 2002 attack on the Limburg oil tanker

May 6, 2012: Fahd al-Quso, who was on the FBI's most-wanted list for his role in the 2000 bombing of the USS *Cole*

May 10, 2012: “Jallad,” who was in charge of armaments for AQAP fighters

May 16, 2012: Samir al-Fathani, a senior local commander

June 19, 2012: Salah al-Jawhari, a militant who had spent three years on Yemen’s most-wanted list

July 3, 2012: Fahd Saleh al-Anjaf al-Harithi, a senior al-Qaeda operative

July 3, 2012: Hassan Ali al-Ishaqi, a senior al-Qaeda operative

August 6, 2012: Abdullah Awad al-Masri—also known as Abou Osama al Maribi—a top AQAP bombmaker

August 31, 2012: Khaled Batis, a top al-Qaeda militant wanted for his role in the 2002 attack on the Limburg oil tanker

September 5, 2012: Murad Ben Salem, a senior al-Qaeda operative

September 8, 2012: Abdulraoof Ahmad Nasser al-Thahab, the brother of Tariq—al-Qaeda’s leader in the Radaa’ District of al-Baidha Province

October 18, 2012: Nader Al-Shadadi, al-Qaeda's leader in Jaar, a city in Abyan Province

October 21, 2012: Sanad Abdulla al-Aqili, an al-Qaeda operative

October 28, 2012: Said al-Shihri, AQAP’s “Number Two,” was wounded in this strike. It has been reported that he died on January 22, 2013 but this has been disrupted by recent AQAP statements. Al-Shihri’s status remains unknown at this time.

November 7, 2012: Adnan al-Qadi, an al-Qaeda operative previously detained in relation to 2008 bombing of the U.S. Embassy in Sanaa

December 28, 2012: Abdullah Bawazir, an al-Qaeda operative who was the chief architect behind a mass prison break in Yemen

December 29, 2012: Saleh Mohammed al-Ameri, a prominent local fighter in the Radaa’ District of al-Baidha Province

January 3, 2013: Moqbel Ebad Al Zawbah, a senior al-Qaeda figure

January 21, 2013: Ahmed al-Ziadi, an al-Qaeda leader in Marib Province

January 21, 2013: Qasem Naser Tuaiman, an al-Qaeda operative who had been freed from detention by Yemeni authorities

January 21, 2013: Ali Saleh Tuaiman, an al-Qaeda operative who had been freed from detention by Yemeni authorities

United States Senate Judiciary Committee
Subcommittee on the Constitution, Civil Rights and Human Rights

Drone Wars: The Constitutional and Counterterrorism Implications of Targeted Killing

Statement of Farea Al-Muslimi

April 23, 2013

Thank you very much, Chairman Durbin and Ranking Member Cruz, for holding this hearing and inviting me here today. I first visited the U.S. Capitol 6 years ago as a 16 year-old, high school exchange student and later to brief congressional staffers on issues related to Yemen. It is a tremendous honor for me to return to the United States Senate to testify today.

My name is Farea Al-Muslimi. I am from Wessab, a remote mountain village in Yemen, about nine hours' drive from my country's capital, Sana'a. Most of the world has never heard of Wessab. But just six days ago, my village was struck by a drone, in an attack that terrified thousands of simple, poor farmers. The drone strike and its impact tore my heart, much as the tragic bombings in Boston last week tore your hearts and also mine.

I have visited locations where U.S. targeted killing strikes have hit their intended targets. And I have visited sites where the U.S. strikes missed their targets and instead killed or injured innocent civilians. I have spoken with grieving family members and angry villagers. I have seen Al Qaeda in the Arabian Peninsula ("AQAP") use U.S. strikes to promote its agenda and try to recruit more terrorists.

I am here today to talk about the human costs and consequences of targeted killing by the United States in Yemen.

My Background

My family lives off the fruit, vegetables, and livestock we raise on our farms. We raise cows, goats, sheep, and hens. My father has been a farmer all his life. His income rarely exceeds \$200 per month. He learned to read late in life, but my mother never did.

I have 12 living siblings. I should actually have 19, but we lost seven of my brothers and sisters. Some passed away in delivery due to a lack of quality medical services in our village. Others passed away when they were still young for the same reasons.

My life changed forever in the 9th grade when I was awarded a scholarship from the U.S. State Department. The scholarship gave me an opportunity to study English for one year at Amideast, the American English Center in Yemen. This scholarship gave me new opportunities and allowed me to see the world beyond my village for the first time.

I was later awarded a State Department scholarship to the Youth and Exchange Study program, which aims to build peace and understanding between the American people and people in Muslim countries.

That scholarship allowed me to spend a year living with an American family and attending an American high school. The year I spent at Rosamond High School in Rosamond, California was one of the richest and best years of my life.

I made exceptional friends with my American classmates and had the most interesting and enriching experience one could imagine. I filled my days spending time with my American friends, learning about American culture, visiting churches almost every Sunday, learning about Christianity for the first time in my life, managing the school's basketball team, walking the Relay for Life, and even participating in a trick or treat at Halloween. In school, I won the Academic Excellence award in my U.S. History class, even ahead of my American classmates.

The most exceptional experience was coming to know someone who ended up being like a father and is my best friend in the United States. He was a member of the U.S. Air Force. Most of my year was spent with him and his family. He came to the mosque with me and I went to church with him. He taught me about his experiences in America and I taught him about my life in Yemen. We developed an amazing friendship that overcame our very different backgrounds.

Through a third scholarship from the U.S. State Department—the Tomorrow's Leaders scholarship—I was able to go to the most prestigious university in the Middle East, the American University of Beirut, where I recently graduated. The Tomorrow's Leaders scholarship enabled me to complete my undergraduate studies in Public Policy.

Working in Yemen as A Journalist, Speaker, and Activist

I will carry the experiences of my time in America with me for the rest of my life. As a high school student, I served as an ambassador to America for the Yemeni people. After that year, however, I returned home and became an ambassador for Americans to my country. I will happily retain this role for the rest of my life. I am a defender of the American values I learned when I studied and lived in the United States.

Today, I am a writer, speaker, and freelance journalist. I have worked with many local, regional, and international non-governmental organizations, including the National Democratic Institute for International Affairs, USAID, and Resonate! Yemen. At the age of 17, I was elected chairman of the Supporting Democracy Committee in the Yemeni Youth Consultative Council.

One of the most rewarding experiences I have had has been working as a “fixer” for international journalists in Yemen and Beirut. This work has allowed me to help the world learn about the experiences of my friends and neighbors. Most of my work with international journalists has been in the southern provinces of Abyan, Aden, Al-dhalea and Lahj—three of the areas where the United States has focused its so-called “war on terror.”

A Drone Strike in My Home Village

Just six days ago, this so-called war came straight to my village. As I was thinking about my testimony and preparing to travel to the United States to participate in this hearing, I learned that a missile from a U.S. drone had struck the village where I was raised. Ironically, I was sitting with a group of American diplomats in Sana'a at a farewell dinner for a dear American friend when the strike happened. As I was leaving my American friends, both of my mobile phones began to receive a storm of text messages

and calls.

For almost all of the people in Wessab, I'm the only person with any connection to the United States. They called and texted me that night with questions that I could not answer: Why was the United States terrifying them with these drones? Why was the United States trying to kill a person with a missile when everyone knows where he is and he could have been easily arrested?

My village is beautiful, but it is very poor and in a remote part of Yemen. Even though the region it is in is about the same size of Bahrain, there isn't a single meter of asphalt road in it. Developmental projects by the central government rarely reach my village and humanitarian aid from international organizations like USAID never does. I know that most people have never heard of Wessab. But I could never have imagined that it would be the location of a drone strike.

My understanding is that Hameed Meftah, who is also known as Hameed Al-Radmi, was the target of the drone strike. Many people in Wessab know Al-Radmi. Earlier on the night he was killed, he was reportedly in the village meeting with the General Secretary of Local Councilors, the head of the local government. A person in the village told me that Al-Radmi had also met with security and government officials at the security headquarters just three days prior to the drone strike. Yemeni officials easily could have found and arrested Al-Radmi.

After the strike, the farmers in Wessab were afraid and angry. They were upset because they know Al-Radmi but they did not know that he was a target, so they could have potentially been with him during the missile strike. Some of the people that were with Al-Radmi when he was killed were never affiliated with AQAP and only knew Al-Radmi socially. The farmers in my village were angry because Al-Radmi was a man with whom government security chiefs had a close connection. He received cooperation from and had an excellent relationship with the government agencies in the village. This made him look legitimate and granted him power in the eyes of those poor farmers, who had no idea that being with him meant they were risking death from a U.S. drone.

The people in my village wanted Al-Radmi to be captured, so that they could question him and find out what he was doing wrong so they could put an end to it. They still don't have an answer to that question. Instead, all they have is the psychological fear and terror that now occupies their souls. They fear that their home or a neighbor's home could be bombed at any time by a U.S. drone.

In the past, most of Wessab's villagers knew little about the United States. My stories about my experiences in America, my American friends, and the American values that I saw for myself helped the villagers I talked to understand the America that I know and love. Now, however, when they think of America they think of the terror they feel from the drones that hover over their heads ready to fire missiles at any time.

I personally don't even know if it is safe for me to go back to Wessab because I am someone who people in my village associate with America and its values. I don't know whether it is safe to travel to visit my mom because the roads are dangerous.

There is nothing villagers in Wessab needed more than a school to educate the local children or a hospital to help decrease the number of women and children dying every day. Had the United States built a school or hospital, it would have instantly changed the lives of my fellow villagers for the better and been the most effective counterterrorism tool. And I can almost certainly assure you that the

villagers would have gone to arrest the target themselves.

Instead of first experiencing America through a school or a hospital, most people in Wessab first experienced America through the terror of a drone strike. What radicals had previously failed to achieve in my village, one drone strike accomplished in an instant: there is now an intense anger and growing hatred of America.

For me personally, it is deeply troubling, astonishing, and challenging to reconcile that the very same hand that taught me English, awarded me scholarships, and dramatically improved my life is the hand that droned my village, terrified my people, and now makes it harder for them to believe the good things that I tell them about America and my American friends. It is especially frustrating to me because all the United States needed to do was identify Al-Radmi as a target, so that he could've been arrested without the injuries, destruction, and death caused by the drone strike.

Visiting with Victims of Targeted Killings

In my work with foreign journalists, I have visited many areas struck by drones or warplanes that residents believe were dispatched as part of the targeted killing program conducted by the United States. I have traveled most frequently to Abyan, an area in southern Yemen, which had been seized in early 2011 by Ansar Al-Sharia, a group aligned with AQAP. One of my trips to Abyan, with National Public Radio, was in mid-January 2012, just two days after the area was freed from AQAP. Traveling in the area was dangerous, both because some AQAP members had simply gone underground by shaving their beards and remaining in town, and because we did not know whether we might find ourselves in a place where a drone might strike next.

In Abyan and other places in Yemen, I visited many locations where local residents were suffering from the consequences of targeted killing operations. I have met with dozens of civilians who were injured during drone strikes and other air attacks. I have met with relatives of people who were killed by drone strikes as well as numerous eyewitnesses. They have told me how these air strikes have changed their lives for the worse.

In early March 2013, I was working with *Newsweek* in Abyan when I met the mother of a boy named Muneer Muhammed. Muneer, an 18 year old boy, transported goods for shops via his donkey in the local souk of Ja'ar town. He had recently been engaged and was preparing for his wedding. Muneer was at work when a missile hit and killed him in May 2012.

At the time of strike, Muneer's mother was in Lahj. She told me that she could not attend her son's funeral or even see him before he was buried, due to the heavy fighting between the government forces and Ansar Al-Shariah along the road between Lahj and Abyan. In fact, the last time this grieving mother saw her son was when she was shown his dead body on a video from a random eyewitness's phone. She told me, in tears, that if she ever meets the individual who shot the missile, she will "crunch him into pieces" in her mouth.

The people with whom we spoke in Abyan told us that Muneer was not a member of AQAP. But that has not stopped AQAP from trying to use his death to recruit supporters to their cause. Local residents told us that they approached one of Muneer's relatives urging him to join AQAP in order to seek revenge for Muneer's death.

Days after Abyan was freed from AQAP control in June 2012, I met a fisherman named Ali Al-Amodi in a hospital in Aden. The day before, his house in Shaqra, on the sea side of Abyan, was targeted by a U.S. air strike. Al-Amodi told me that he stood helplessly as his 4 year old son and 6 year old daughter died in his arms on the way to the hospital.

Al-Amodi had no links with AQAP. He and other locals said that his house was targeted by mistake. In that same strike, four other children and one woman were killed. Witnesses said none were militants.

Later in June 2012, I visited Al-Makhzan, a town outside of Ja'ar, where a drone strike targeting Nader Al-Shadadi took place. Al-Shadadi is identified by the Yemeni government as a terrorist and a leader of Ansar Al-Shariah. He has been targeted at least three times in different places, but the strikes have missed him every time. This time, it targeted his aunt's house. Neighbors say he was not there, and his aunt's only son was killed. There is no evidence that the son was affiliated with AQAP.

Ma'mon, a 12 year old boy who lives next door and witnessed the aftermath of the strike, had tears in his eyes when he told me how the sound of the strike woke him up that morning. Referring to the drones, he told me how "we hear them every night" and that he is afraid each day that they "will come back."

In Aden, I spoke with Saleh Bin Fareed, one of the tribal leaders present on December 17, 2009 at the site where a U.S. cruise missile targeted the village of Al-Majalah in Lawdar, Abyan. In the poor village that day, more than 40 civilians were killed, including four pregnant women. Bin Fareed was one of the first people to the scene. He and others tried to rescue civilians. He told me their bodies were so decimated that it was impossible to differentiate between the children, the women, and their animals. Some of these innocent people were buried in the same grave as animals.

Widespread Impact of Targeted Killing in Yemen

The killing of innocent civilians by U.S. missiles in Yemen is helping to destabilize my country and create an environment from which AQAP benefits. Every time an innocent civilian is killed or maimed by a U.S. drone strike or another targeted killing, it is felt by Yemenis across the country. These strikes often cause animosity towards the United States and create a backlash that undermines the national security goals of the United States. The U.S. strikes also increase my people's hatred against the central government, which is seen as propped up by the Persian Gulf governments and the United States.

I know that some policy makers in the United States and Yemen claim that AQAP does not use drone strikes as a tool to recruit more people to their cause. This is incorrect. The case of the Toaiman family in Mareb, as reported by NPR based on a trip in which I participated, is one specific example. The Toaiman's oldest son joined AQAP hoping to avenge the death of his father, an innocent civilian killed by a drone strike in October 2011. The son has 28 brothers waiting to do so as well. One of his youngest brothers, a 9 year old, carries a picture of a plane in his pocket. The boy openly states that he wants revenge and identifies his father's killer as "America."

But the main issue is not whether AQAP recruits more terrorists because of drone strikes. AQAP's power and influence has never been based on the number of members in its ranks. AQAP recruits and retains power through its ideology, which relies in large part on the Yemeni people believing that America is at war with them.

Another argument I frequently hear is that drones are more effective than ground forces. But the Yemeni government has not made a serious effort to use ground forces against AQAP in my country. For example, the Counter Terrorism Unit of the Central Security Forces, which was funded and trained by the United States, did not even engage in the fight against AQAP when AQAP controlled the main cities of Abyan for more than a year until mid-2012. On the roads surrounding Abyan, AQAP was fought by poorly equipped, underage soldiers. In fact, I have never seen such a poorly armed and shabby looking army as the one I saw in Abyan. It is well known that the Yemeni Army has more military equipment and better-trained soldiers around other governorates in the south, where AQAP does not have a strong presence.

Air Strikes Complicate Internal Yemeni Dynamics

Whether targeted killings strikes are carried out by U.S. forces or Yemeni forces at the United States' request often makes little difference, especially when strikes kill innocent civilians. Yemenis already have a strained relationship with their own armed forces because of the internal conflicts in our country. (Even though I just turned 23, I have lived through nine wars in my life: six in Sada, one in the southern provinces in 1994, the recent conflict in Abyan, and the 2011 conflict in Sana'a. The U.S. targeted killing program is the 10th war I have lived through.) The fact that innocent civilians are dying and the Yemeni army is receiving so much support from the United States strains that relationship even more.

All of this is happening at a critical moment in Yemen, which is being governed by a transitional president after our president of 33 years, Ali Abdullah Saleh, was forced from office during a popular uprising. The transitional phase seeks to maintain national cohesion and unity, but anger and distrust linger underneath the surface, creating ideal conditions for AQAP to grow and undermine progress. AQAP exploited similar divisions in 2011 at the start of the popular uprising. As the central government sought to squelch peaceful protests in Sana'a, the Abyan province fell into the hands of AQAP.

To be clear, the United States is not the only foreign country trying to influence events on the ground in Yemen. The Houthis, a group that is supported by Iran, have been reportedly working to make Yemen's president look like a U.S. puppet, in order to undermine his administration and hinder a peaceful transition. Yemen's transitional president, Abdu Rabu Mansour Hadi, has publicly endorsed U.S. drone strikes, which are widely despised by the Yemeni people. That endorsement was a gift for all the opposition groups wanting to discredit Hadi, whether those groups are aligned with Iran or even AQAP. As President Hadi declared his support for U.S. drone strikes, the Houthis gained credibility in the eyes of thousands of Yemenis.

In another, perverse sense, targeted killings further the goals of AQAP. What AQAP fighters ultimately demand, according to their ideology and distortion of Islam, is heaven and martyrdom. In their minds, when they are targeted and killed by a drone strike, that's exactly what they receive. Instead of effectively combating AQAP's ideology through a comprehensive approach that includes economic and social development, as well as ideological tactics, air strikes amount to a military-only solution.

The drone strikes are the face of America to many Yemenis. If America is providing economic, social and humanitarian assistance to Yemen, the vast majority of the Yemeni people know nothing about it.

Everyone in Yemen, however, knows about America and its drones. Again, this allows AQAP to convince more individuals that America is at war with Yemen.

Drone strikes also distract Yemenis from AQAP, which is the real enemy. They focus all the attention on the sky to the neglect of everything else. Because of drone strikes, ordinary Yemenis who are not affiliated with AQAP live in fear of being targeted. This fear permeates our country and it is shared by the youngest and oldest Yemenis. A middle age man from Rada'a, in central Yemen, said in an interview recently: "In the past, mothers used to tell their kids to go to bed or I will call your father. Now, they say, 'Go to bed or I will call the planes.'"

The U.S. War against AQAP Is a War of Mistakes

If it's not already clear from my testimony today, let me say this very plainly: I hate AQAP. I don't support their ideology. I don't like the way they have distorted my religion. And I despise their methods. The fight against AQAP, however, is not a traditional war. And I fear that these air strikes undermine the United States' effort to defeat AQAP and win the hearts and minds of the Yemeni people. You can't win this war by simply killing more people on the other side. Rather, I see the war against AQAP as a war of mistakes. The fewer mistakes you make, the more likely you are to win. Simply put, with drone strikes, the United States has made more mistakes than AQAP.

To be clear, I am not only referring to the mistake of killing innocent civilians. Of course, the death of an innocent civilian is the most tragic mistake of all. Nevertheless, even when no civilians are harmed, the United States makes a huge mistake when missiles fail to reach their intended target. Drone strikes that miss their targets make these terrorists look brave. They become role models, simply by evading weapons being launched by the greatest military power on earth. Perhaps the greatest source of satire, ridicule, and propaganda against the United States and Yemeni governments occurs when they claim to have killed ranking terrorists, like Saeed Al-Shahri or Nader Al-Shadadi, only to be proven wrong days later.

The United States and Yemeni government could make it harder for terrorists to get the critical support they need and also prevent more civilians from dying by announcing the AQAP members on their lists. I know this would have helped in my village. As a tribal leader from Rada'a, Soliman Al-homikani, told me last month in Sana'a, "[i]f I knew that this person was AQAP, I would never have let him get into my house or even to the area. But since I have no idea who is Qaeda and who is not, I let them in my house, as some have done, and they get targeted: militants and uninformed citizens."

Another lesson is worth mentioning here: AQAP paid the owner of the house in Ja'ar 38,000 Saudi riyals as compensation for causing damage to her house after the air strike. As far as I know, the U.S. government has never paid any sort of compensation to civilian victims in my country and the Yemeni government has paid next to nothing. Here, again, AQAP scores points in the propaganda war while the United States and Yemen do not.

Conclusion and Recommendations

I don't know if there is anyone on Earth who feels more thankful to America than me. In my heart I know that I can only repay the opportunities, friendship, warmth, and exposure your country provided me by being their ambassador to Yemenis for the rest of my life, just as I was an ambassador for Yemenis in America. I strongly believe that I have helped improved America's image, perhaps in ways

that an official ambassador or other diplomat cannot. I have access to ordinary Yemenis. For me, helping the people of my country understand and know the America that I have experienced is a passion and not a career.

I have to say that the drone strikes and the targeted killing program have made my passion and mission in support of America almost impossible in Yemen. In some areas of Yemen, the anger against America that results from the strikes makes it dangerous for me to even acknowledge having visited America, much less testify how much my life changed thanks to the State Department scholarships. It's sometimes too dangerous to even admit that I have American friends.

Late last year, I was with an American colleague from an international media outlet on a tour of Abyan. Suddenly, locals started to become paranoid. They were moving erratically and frantically pointing toward the sky. Based on their past experiences with drone strikes, they told us that the thing hovering above us – out of sight and making a strange humming noise – was an American drone. My heart sank. I was helpless. It was the first time that I had earnestly feared for my life, or for an American friend's life in Yemen. I was standing there at the mercy of a drone.

I also couldn't help but think that the operator of this drone just might be my American friend with whom I had the warmest and deepest friendship in America. My mind was racing and my heart was torn. I was torn between the great country that I know and love and the drone above my head that could not differentiate between me and some AQAP militant. It was one of the most divisive and difficult feelings I have ever encountered.

That feeling, multiplied by the highest number mathematicians have, gripped me when my village was droned just days ago. It is the worst feeling I have ever had. I was devastated for days because I knew that the bombing in my village by the United States would empower militants. Even worse, I know it will make people like Al-Radmi look like a hero, while I look like someone who has betrayed his country by supporting America.

As someone who has lived and worked on this issue very closely, I cannot help but feel that the American and Yemen governments are losing the war against AQAP. Even when drone strikes target and kill the right people, it is at the expense of creating the many strategic problems I have discussed today. Every tactical success is at the expense of creating more strategic problems. I do, however, believe that things can still be fixed. If the United States wants to win the battle against AQAP in Yemen, I strongly suggest that it consider taking the following steps:

- Stop all the targeted killing strikes.
- Announce the names of those already on the “kill list,” so that innocent civilians can stay out of harm's way.
- Issue an official apology to the families of all civilians killed or injured by targeted killing strikes.
- Compensate the families of innocent civilians killed or injured by strikes conducted or authorized by the United States.
- In every village where there has been a targeted killing, build a school or hospital so that the villagers' only experience with America will not be the death and destruction caused by an American missile.

Thank you very much.

United States Senate Judiciary Committee
Subcommittee on the Constitution, Civil Rights and Human Rights
Senator Richard J. Durbin, Chairman

Drone Wars: The Constitutional and Counterterrorism Implications of Targeted Killing
Tuesday, April 23, 2013

Opening Statement

Today's hearing is the first-ever public hearing in the Senate to address the use of drones for targeted killing.

The Constitution bestows upon the President of the United States the unique responsibility and title of Commander in Chief. And with that title comes the responsibility to protect and defend our country from foreign and domestic enemies. To accomplish this goal the President has a military that is the best trained, best equipped and most effective fighting force in history.

While the tactics and tools used by our military are ever evolving, one thing must remain constant: ours is a democratic society where the rule of law prevails. The President must exercise his authority as Commander in Chief within the framework established by the Constitution and laws passed by Congress. Even as President Obama commands a military with the most sophisticated weapons known to man, including the weaponized drones used in targeted killing operations, his authority is still grounded in words written more than two hundred years ago.

At times, over the course of our history the rule of law has been abused during times of war. When this occurs it challenges America's moral authority and standing in the world.

This potential for abuse is a stark reminder of Congress's responsibility to authorize the use of force only in narrow circumstances and to conduct vigorous oversight once authorized. The heat of battle and the instinct to defend can create moral, legal and constitutional challenges. We can all recall the controversy surrounding the use of torture by the previous Administration. Torture, though clearly illegal under both domestic and international law, was rationalized by some as appropriate in our war against terrorism.

Today's subject, the targeted killing of combatants – in contrast to torture - has always been a part of warfare in areas of active hostilities. In recent years, however, it has been employed more frequently away from the traditional battlefield.

The use of drones has, in stark terms, made targeted killing more efficient and less costly – in terms of American blood and treasure. There are, however, long term consequences, especially when these air strikes kill innocent civilians. That's why many in the national security community are concerned that we may undermine our counter terrorism efforts if we do not carefully measure the benefits and the costs of targeted killing.

This Administration has not claimed the authority to override laws, like the criminal prohibition on torture. Instead, it has attempted to ground its use of drones in a statute, the 2001 Congressional Authorization to Use Military Force. And officials like Attorney General Eric Holder and CIA Director John Brennan have acknowledged the strikes and delivered speeches explaining the Administration's legal and policy positions.

In my view, more transparency is needed to maintain the support of the American people and the international community. For example, the Administration should provide more information about its analysis of its legal authority to engage in targeted killing and the internal checks and balances involved in U.S. drone strikes.

And the Administration must work with Congress to address a number of serious and challenging questions, some of which are being hotly debated even as we meet:

- What is the constitutional and statutory justification for targeted killing?
- What due process protections extend to an American citizen overseas before he is targeted and killed by a drone strike?
- What are the legal limits on the "battlefield" in the conflict with Al Qaeda? And is it legal to use drones not just in war zones like Afghanistan, but also to target terrorist suspects in places where the U.S. is not involved in active combat, such as Somalia and Yemen?
- What is the legal definition of a "combatant" in the conflict with Al Qaeda? And who qualifies as "associated forces" under the 2001 Authorization to Use Military Force?
- Should the U.S. lead an effort to create an international legal regime governing the use of drones?
- What moral and legal responsibility does the United States have to acknowledge its role in targeted killing and make amends for inadvertent destruction and loss of life, particularly where missiles kill or injure innocent civilians?

These are some of the questions that we will explore in today's hearing.

Speaking recently about the use of drones, President Obama said, "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 is reined in."

I agree with President Obama on the need for a clear, legitimate, and transparent legal framework for targeted killing. Today is the first step in that process.

I do want to note for the record that I am disappointed that the Administration declined to provide witnesses to testify at today's hearing. I hope we have the opportunity to work with the Administration more closely moving forward.

**Statement of Senator Patrick Leahy (D-Vt.),
Chairman, Senate Judiciary Committee,
Hearing On
“Drone Wars: The Constitutional and Counterterrorism Implications of Targeted Killing”
April 23, 2013**

Today, the Subcommittee on the Constitution, Civil Rights, and Human Rights holds an important hearing to explore the administration’s use of unmanned aerial vehicles, or “drones,” to target and kill suspected terrorists overseas. The subcommittee will examine the constitutional and statutory authority to use drones to conduct these targeted killings, as well as key questions regarding the scope of the battlefield, which individuals can be targeted, and the possibility of establishing a transparent legal framework for the use of drones by the government. I thank Senator Durbin for his continued leadership and persistence on these issues.

As we will hear from the witnesses today, the number of drone strikes overseas has risen dramatically in recent years, as has the death toll of both suspected terrorists and civilians. Although the total number of civilian casualties resulting from these strikes is a subject of ongoing debate, it cannot be disputed that American drone strikes overseas have stirred significant controversy, particularly in Pakistan, Yemen, and other countries of great strategic interest. For example, the reported practice of conducting “signature strikes” that do not target specific individuals, but rather persons who fall within a defined set of characteristics, has raised questions about the extent to which drone strikes are actually “targeted.” I am glad that today’s hearing will provide an opportunity to explore the broader foreign policy and humanitarian concerns raised by the use of drones to conduct targeted killings overseas – regardless of the nationality or citizenship of the targets.

It will also be important for us to examine carefully the constitutional implications of the use of drones to conduct counterterrorism operations overseas. The U.S. government is presumably conducting targeted drone strikes against terrorists overseas pursuant to the 2001 Authorization for the Use of Military Force, as well as the President’s executive war powers under Article II, but we must consider the limits of these authorities in the context of the use of drones. When U.S. troops were fully engaged on a so-called “hot” battlefield during the war in Afghanistan, the boundaries of the legal authorities upon which the administration relied upon for the use of force were much clearer. The scope of authority to conduct targeted drone strikes in Yemen or other locations beyond the traditional battlefield, however, is less clear. I hope that Congress will continue to scrutinize these activities, as well as the legal authorities for such strikes.

Congressional scrutiny will be particularly necessary as we continue to examine the constitutional and statutory authority that the administration asserts in targeting U.S. citizens overseas. For more than a year, I sought access to the complete legal justification prepared by the Department of Justice Office of Legal Counsel (OLC) to support the targeted killing of Americans. Members of our Committee have now been provided access to some OLC documents related to the targeting of U.S. citizens, and although I cannot share the substance of these classified documents, I can say that I spent considerable time scrutinizing these opinions and remain concerned about the constitutional and legal underpinnings that justify the targeted killing of American citizens overseas. I will continue to seek additional information from the

administration about these targeting decisions and the constitutional and legal authorities upon which it relies, and I will continue to advocate for public disclosure of this legal analysis, consistent with the protection of national security.

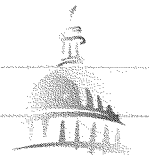
As we examine carefully the use of drones to conduct targeted killings, we should consider ways to ensure appropriate transparency and accountability. Several officials have discussed the possibility of establishing a separate court or tribunal to review, either before or after, the targeting decisions made by the executive branch, much like the Foreign Intelligence Surveillance Court. Additionally, press accounts have exposed debates within the administration about formally establishing a “playbook” to install specific procedures, guidelines, and restrictions on the executive’s ability to conduct drone strikes. I express no opinions on these specific proposals today, but I strongly believe that Congress must ensure that there are rigorous procedures in place for targeting decisions, as well as appropriate oversight, safeguards and transparency for Members of Congress and the public.

The Judiciary Committee has an important responsibility to conduct oversight of the executive branch – particularly concerning constitutional and national security issues. I look forward to the testimony from our witnesses so that we can work to ensure our safety and security, while also bringing terrorists to justice in ways that are consistent with our Constitution, our laws, and our values.

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U.S. Senator Chuck Grassley • Iowa
Ranking Member • Senate Judiciary Committee

<http://grassley.senate.gov>



Prepared Statement of Ranking Member Chuck Grassley of Iowa
 U.S. Senate Committee on the Judiciary
 Subcommittee on the Constitution, Civil Rights and Human Rights
 Hearing on “Drone Wars: The Constitutional and
 Counterterrorism Implications of Targeted Killings”
 Tuesday, April 23, 2013

Mr. Chairman, thank you for holding today’s hearing on the legal and strategic implications of using unmanned drones as part of our international counterterrorism strategy.

Article II of the Constitution confers on the president the role of Commander in Chief. As such, it confers the responsibility and authority to order action in defense of the nation. This includes ordering lethal action if necessary and justified under the law.

I look forward to hearing from today’s panel of witnesses and hope that they can help shed light on the legal and operational boundaries for the use of such force.

This hearing is particularly important given the reluctance of the Administration to provide clear answers on this topic. For example, if the Administration had come out earlier and said that they would not use drones to target American citizens on U.S. soil—something the Attorney General has now explicitly ruled out—the President could have avoided a filibuster on the floor of the United States Senate.

It should never have taken a filibuster for members of Congress to get a clear answer about when the Executive Branch thinks it can kill an American citizen.

Nor should it have taken over a year for the Administration to respond to joint requests from Chairman Leahy and me about the legal justifications for targeted killings.

With proper and lawful justification, I believe that the limited and responsible use of drones can be a valuable tool in the international war on terrorism and combatting those who would do harm to the United States.

On the surface, the idea that the use of drones to target a foreign terrorist believed to be involved in terrorism seems reasonable. However, those questions are by no means clearly defined under the law of war and become increasingly muddled when an American citizen is involved.

This difficulty was highlighted in the plurality opinion from the Supreme Court in *Hamdi v. Rumsfeld*. That decision upheld the notion that an American citizen captured on the battlefield in Afghanistan could be detained incident to war. Clearly, if the President has the lawful constitutional authority to detain incident to war, that would include the ability to use lethal force as part of those hostilities.

However, this legal basis is not necessarily the same when applied to a U.S. citizen on U.S. soil. Indeed the Court in *Hamdi* also found that prolonged detention by the Government warranted review via *Habeas Corpus*.

So, given this complexity, it is good to have a hearing to discuss this power and the constraints on the Executive Branch in using it.

Our constitutional oversight responsibilities require us to probe a little deeper and demand more transparency from this Administration to make sure this powerful tool is not being abused.

When we are dealing with a situation where the Executive Branch decides that a person is involved in terrorist activities sufficient to warrant killing by a drone strike, we need to be sure we understand what standard of proof they are using to put such a label on a person.

Additionally, the question becomes more complex when the person being targeted overseas is an American. How does the Administration decide that such an American is a terrorist and order his death by drone without due process? What level of proof is required? How reliable is the information being considered?

It is important that the Administration provide transparency to the legal framework so that we can make sure that proper safeguards are in place to ensure that there is responsible use of drone strikes in the war on terror.

I look forward to discussing these issues with our panel.

Thank you.

**Senate Judiciary Committee
Subcommittee on Constitution, Civil Rights and Human Rights**

**Drone Wars: The Constitutional and Counterterrorism Implications of Targeted Killing
April 23, 2013**

From Senator Durbin

Questions for the Record for Rosa Brooks

1. In a speech in April of last year, CIA Director John Brennan, who was then serving as a senior counterterrorism advisor to President Obama, discussed “the rigorous standards and process of review to which [the Administration holds itself]... when considering and authorizing strikes against a specific member of al-Qaida outside the hot battlefield of Afghanistan.” Brennan asserted that lethal force is used only when an individual is a legitimate target who “poses a significant threat to U.S. interests” and capture is infeasible. Some national security experts argue that this assertion is not entirely consistent with the use of so-called signature strikes. In signature strikes, anonymous, suspected militants are reportedly targeted on the basis of descriptions, behavioral patterns, and other characteristics that bear similarities to terrorist leaders on the run.

What is publicly known about the criteria used to select the targets of signature strikes and confirm that these individuals are, in fact, militants?

Do the tactical and strategic consequences of signature strikes risk undermining the overall counterterrorism goals or moral authority of the United States?

2. Your written testimony states that Congress or the Executive Branch should create a non-partisan commission to “review intelligence reports and conduct a thorough policy review of past and current targeted killing policy, evaluating the risk of setting international precedents, the impact of US targeted killing policy on allies, and the impact on broader US counterterrorism goals.” You recommend that this commission issue both classified and unclassified reports.

Please elaborate on this recommendation. How would you define scope of the commission’s substantive responsibility and the specific issues on which it should focus?

Which private stakeholders and public entities should be represented on the commission to reflect the range of perspectives?

**Senate Judiciary Committee
Subcommittee on Constitution, Civil Rights and Human Rights**

**Drone Wars: The Constitutional and Counterterrorism Implications of Targeted Killing
April 23, 2013**

From Senator Durbin

Questions for the Record for Gen. James Cartwright

1. In a speech in April of last year, CIA Director John Brennan, who was then serving as a senior counterterrorism advisor to President Obama, discussed “the rigorous standards and process of review to which [the Administration holds itself]... when considering and authorizing strikes against a specific member of al-Qaida outside the hot battlefield of Afghanistan.” Brennan asserted that lethal force is used only when an individual is a legitimate target who “poses a significant threat to U.S. interests” and capture is infeasible. Some national security experts argue that this assertion is not entirely consistent with the use of so-called signature strikes. In signature strikes, anonymous, suspected militants are reportedly targeted on the basis of descriptions, behavioral patterns, and other characteristics that bear similarities to terrorist leaders on the run.

What is publicly known about the criteria used to select the targets of signature strikes and confirm that these individuals are, in fact, militants?

Do the tactical and strategic consequences of signature strikes risk undermining the overall counterterrorism goals or moral authority of the United States?

2. There are reportedly a series of policies, procedures, and safeguards currently in place that Defense Department officials must follow before carrying out a drone strike, in order to ensure legal authorization, reduce the potential for error, verify the target, and limit civilian casualties. Would you please provide an unclassified overview of those policies and procedures and provide your recommendations on how they can be enhanced?

QUESTIONS SUBMITTED TO PETER BERGEN BY SENATOR FRANKEN

**Senate Judiciary Committee
Subcommittee on Constitution, Civil Rights and Human Rights
Hearing on “Drone Wars: The Constitutional and Counterterrorism Implications of
Targeted Killing”
April 23, 2013**

Questions for the Record for Peter Bergen

- There is a lot of ambiguity about where we are using drones and who we are targeting. I have heard estimates that as many as 4700 people have been killed as a result of drone strikes. Based on your research, do you think that number is accurate, and can you please list the countries where you think we have deployed drones and the approximate time frame that they have been in use?
- I share your concern that drone technology is going to trigger an arms race of sorts and that it won't be long before every country has an arsenal of drones. Can you tell us more about what you have uncovered about other countries' plans to acquire and use drone technology? How long do you think it will be until weaponized drones are fairly ubiquitous?

QUESTIONS SUBMITTED TO PROF. ROSA BROOKS BY SENATOR FRANKEN

**Senate Judiciary Committee
Subcommittee on Constitution, Civil Rights and Human Rights
Hearing on “Drone Wars: The Constitutional and Counterterrorism Implications of
Targeted Killing”
April 23, 2013**

Questions for the Record for Rosa Brooks

- The Department of Justice’s white paper on the targeted killing of U.S. citizens overseas articulates a novel, and some would say, dangerously broad standard for what would constitute an imminent threat. What do you think are the implications of such a broad standard for imminence?
- The U.S. government has apparently conducted a number of “double tap” strikes, where we have targeted the same location in back-to-back strikes. I am concerned that these sorts of double-hits may place innocent people running to help those injured in the initial strike in great danger. Some critics of these strikes contend they violate the Geneva Conventions. Do you agree, and if so, can you explain why?
- You testified that you favored repeal of the 2001 AUMF and expressed skepticism about the need for new statutory authority to authorize military force against emerging global threats. Can you elaborate on your reasoning?
- Can you explain the difference under international law between targeting and killing an operational leader versus someone who is not engaged in active combat, like a cook?
- If the U.S. government is classifying all military-age males in a drone strike as active combatants, would this violate the principle of distinction? If so, please explain why and whether you think the U.S. government should adhere to this principle.

QUESTIONS SUBMITTED TO GEN. JAMES CARTWRIGHT BY SENATOR FRANKEN

**Senate Judiciary Committee
Subcommittee on Constitution, Civil Rights and Human Rights
Hearing on “Drone Wars: The Constitutional and Counterterrorism Implications of
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April 23, 2013**

Questions for the Record for General James Cartwright

- The Department of Justice’s white paper on the targeted killing of U.S. citizens overseas articulates a novel, and some would say, dangerously broad standard for what would constitute an imminent threat. What do you think are the implications of such a broad standard for imminence?
- The U.S. government has apparently conducted a number of “double tap” strikes, where we have targeted the same location in back-to-back strikes. I am concerned that these sorts of double-hits place victims of the initial strike, as well as the people running to help them, in great danger. Critics of these strikes contend they violate the Geneva Conventions. Do you agree, and if so, can you explain why?
- The U.S. government has conducted a number of signature strikes against alleged members of al- Qaeda. Do you know what the government’s process is for verifying that a target is indeed a member of al-Qaeda? Similarly, do you know how the administration determines what are “associated forces” of al-Qaeda?
- How has the adaptation of policy and law lagged behind implementation of the capabilities of drone technology, in your view? What is not adequately being considered, and how might policy on the use of drones be improved?

QUESTIONS SUBMITTED TO COL. MARTHA MCSALLY BY SENATOR FRANKEN

**Senate Judiciary Committee
Subcommittee on Constitution, Civil Rights and Human Rights
Hearing on "Drone Wars: The Constitutional and Counterterrorism Implications of
Targeted Killing"
April 23, 2013**

Questions for the Record for Colonel Martha McSally

- The U.S. government has conducted a number of signature strikes against alleged members of al- Qaeda. Do you know what the government's process is for verifying that a target is indeed a member of al-Qaeda? Similarly, do you know how the administration determines what are "associated forces" of al-Qaeda?
- Can you explain when a lawful, tactically feasible drone strike on a potential target outside a clear battlefield -- for example in Yemen or Somalia -- becomes strategically unwise, and how that decision gets made?

RESPONSES OF PETER BERGEN TO QUESTIONS
SUBMITTED BY SENATOR FRANKEN

Senate Judiciary Committee
Subcommittee on Constitution, Civil Rights and Human Rights
Hearing on "Drone Wars: The Constitutional and Counterterrorism Implications of
Targeted Killing"
April 23, 2013

Questions for the Record for Peter Bergen

1. **There is a lot of ambiguity about where we are using drones and who we are targeting. I have heard estimates that as many as 4700 people have been killed as a result of drone strikes. Based on your research, do you think that number is accurate, and can you please list the countries where you think we have deployed drones and the approximate time frame that they have been in use?**

According to New America Foundation data (<http://counterterrorism.newamerica.net/drones>), US drone strikes in Pakistan and Yemen have killed between 2,439 and 3,982, 476-698 of whom we have identified as civilians or "unknowns" (we include an "unknown" category because it is sometimes too difficult to tell from media reports whether those killed are believed to be militants or civilians). We do not currently track the strikes in Somalia, and because the strikes in Afghanistan are conducted within the sphere of the conflict there, they are outside the purview of our research into targeted killings. The 4,700 figure you cite is possible when you include all U.S. drone deployments, but it's far above even our highest estimate for deaths in CIA-operated drone programs in Pakistan (where 80% of the strikes take place) and Yemen combined.

The United States has used CIA-controlled drones for targeted killing operations in Pakistan (2004-present), Yemen (2002; 2010-present), Somalia (unsure) and perhaps the Philippines (one reported 2006 strike against Indonesian targets in the Philippines has been denied by the Philippines military). In addition, the US military has used armed drones in Afghanistan and Iraq.

2. **I share your concern that drone technology is going to trigger an arms race of sorts and that it won't be long before every country has an arsenal of drones. Can you tell us more about what you have uncovered about other countries' plans to acquire and use drone technology? How long do you think it will be until weaponized drones are fairly ubiquitous?**

According to New America Foundation data, around 80 countries are currently involved in developing drone technology or have acquired it from another state. Only the United States, the United Kingdom, and Israel are known to have used armed drones to target adversaries, but China and Iran also claim to have built their own lethal drones. In February 2103, the New York Times reported that the Chinese government considered killing a drug lord in Myanmar using a drone, but eventually nixed the idea. Hezbollah has flown Iranian-made "single-use" kamikaze drones toward Israel, though Israeli anti-aircraft missiles easily shot them down. The UN Special Rapporteur for Human Rights and Counterterrorism Ben Emmerson said at a New America

event in May 2013 that he expects many states and some non-state actors to possess armed drones within five years. Our research supports that prediction.

Israel is the world's largest exporter of drones and drone technology, and the state-owned Israeli Aerospace Industries (IAI) has sold to countries as varied as Nigeria, Russia and Mexico. IAI has also reportedly sold a "loitering weapon" called the Harop to India, Turkey, France, and Germany. The Harop can circle over a target for hours before it is activated and sent to the ground as a single-use missile.

In March 2012, the U.S. government agreed to arm Italy's six Reaper drones but rejected a request from Turkey to purchase armed Predator drones. (An official in Turkey's Defense Ministry then said in July 2012 that Turkey planned to arm its own domestically produced drone, the Anka.)

Sweden, Greece, Switzerland, Spain, Italy and France are working on a joint project through state-owned aeronautical companies and are in the final stages of developing an advanced armed drone prototype called the Dassault nEURon, from which the France plans to derive armed drones for its air force.

**Senate Judiciary Committee
Subcommittee on Constitution, Civil Rights and Human Rights**

**Drone Wars: The Constitutional and Counterterrorism Implications of Targeted Killing
April 23, 2013**

From Senator Durbin

Questions for the Record for Gen. James Cartwright

1. In a speech in April of last year, CIA Director John Brennan, who was then serving as a senior counterterrorism advisor to President Obama, discussed “the rigorous standards and process of review to which [the Administration holds itself]... when considering and authorizing strikes against a specific member of al-Qaida outside the hot battlefield of Afghanistan.” Brennan asserted that lethal force is used only when an individual is a legitimate target who “poses a significant threat to U.S. interests” and capture is infeasible. Some national security experts argue that this assertion is not entirely consistent with the use of so-called signature strikes. In signature strikes, anonymous, suspected militants are reportedly targeted on the basis of descriptions, behavioral patterns, and other characteristics that bear similarities to terrorist leaders on the run.

What is publicly known about the criteria used to select the targets of signature strikes and confirm that these individuals are, in fact, militants?

I cannot answer what is publicly known about the criteria used to select the target of signature strikes. What I can provide is that the U.S. Air Force MQ-1/9 aircraft record all mission sensor data. Consideration should be given for establishing guidelines on retention and review of this mission sensor data.

Do the tactical and strategic consequences of signature strikes risk undermining the overall counterterrorism goals or moral authority of the United States?

If strategy, tactics, and techniques imposed are perceived to do more harm than good, we risk undermining the overall counterterrorism goals and moral authority. There is reasonable evidence, in the public reporting, this may be the case. How accurate a reflection the reporting is, is not conclusive however, it is sufficiently prevalent to cause concern.

2. There are reportedly a series of policies, procedures, and safeguards currently in place that Defense Department officials must follow before carrying out a drone strike, in order to ensure legal authorization, reduce the potential for error, verify the target, and limit civilian casualties.

Would you please provide an unclassified overview of those policies and procedures and provide your recommendations on how they can be enhanced?

I retired from active duty in 2011. I recommend the committee ask DOD to provide established policies, procedures, and safeguards, currently in place, for any strike inside and outside of declared Areas of Hostility. I would also recommend a request for DOD to provide any remotely piloted aircraft-unique procedures and safeguards.

RESPONSES OF GEN. JAMES CARTWRIGHT
TO QUESTIONS SUBMITTED BY SENATOR FRANKEN

Senate Judiciary Committee
Subcommittee on Constitution, Civil Rights and Human Rights
Hearing on “Drone Wars: The Constitutional and Counterterrorism Implications of Targeted Killing”
April 23, 2013

Questions for the Record for General James Cartwright

- The Department of Justice’s white paper on the targeted killing of U.S. citizens overseas articulates a novel, and some would say, dangerously broad standard for what would constitute an imminent threat. What do you think are the implications of such a broad standard for imminence?

Committee witnesses, Rosa Brooks and Ilya Somin, are far more qualified than I to answer this question. I would only observe that if the criteria for imminence are too broad, they risk the inclusion of too many targets to be useful and/or responsible; if the criteria are too narrow in cases where the ability to act is fleeting, they risk the loss of opportunity to prevent serious harm.

- The U.S. government has apparently conducted a number of “double tap” strikes, where we have targeted the same location in back-to-back strikes. I am concerned that these sorts of double-hits place victims of the initial strike, as well as the people running to help them, in great danger. Critics of these strikes contend they violate the Geneva Conventions. Do you agree, and if so, can you explain why?

I do not advocate violating the Geneva Conventions. U.S. Air Force MQ-1/9 aircraft record all mission sensor data. If a violation of the engagement criterion or legal norms occurs, it would have been recorded and should be made available for review. I would not recommend the elimination of re-strike. There are many instances when re-strike is an appropriate action. I would recommend establishing the criteria for review of post-strike data for accountability and oversight purposes.

- The U.S. government has conducted a number of signature strikes against alleged members of al- Qaeda. Do you know what the government’s process is for verifying that a target is indeed a member of al-Qaeda? Similarly, do you know how the administration determines what are “associated forces” of al-Qaeda?

I retired from active service in 2011. I am not current on the criteria for target verification or determination of “associated forces”. Both are likely to be classified.

- How has the adaptation of policy and law lagged behind implementation of the capabilities of drone technology, in your view? What is not adequately being considered, and how might policy on the use of drones be improved?

Remotely piloted aircraft provide an unprecedented ability for target identification, management of collateral damage, persistence in the target area until all criteria are satisfied and post-strike accountability. The scenarios we addressed in the hearing (i.e., strikes against individuals or groups that pose a threat to the U.S. and/or its interests, outside of a normally declared area of hostility) are a very small segment of how the U.S. uses remotely piloted aircraft. I know of no better platform to perform this mission. A critical policy review is better focused on the scenario vice the weapon system. That said, to address the question -- improvements in the review and accountability requirements of post-strike records would enhance oversight of target identification, collateral damage management, and policy/legal compliance. Post-strike review could accomplish this without unduly risking the loss of an opportunity to prevent further harm to our interests arising from not acting against fleeting opportunities.

**Senate Judiciary Committee
Subcommittee on Constitution, Civil Rights and Human Rights**

**Drone Wars: The Constitutional and Counterterrorism Implications of Targeted Killing
April 23, 2013**

From Senator Durbin

Questions for the Record for Rosa Brooks

1. In a speech in April of last year, CIA Director John Brennan, who was then serving as a senior counterterrorism advisor to President Obama, discussed “the rigorous standards and process of review to which [the Administration holds itself]... when considering and authorizing strikes against a specific member of al-Qaida outside the hot battlefield of Afghanistan.” Brennan asserted that lethal force is used only when an individual is a legitimate target who “poses a significant threat to U.S. interests” and capture is infeasible. Some national security experts argue that this assertion is not entirely consistent with the use of so-called signature strikes. In signature strikes, anonymous, suspected militants are reportedly targeted on the basis of descriptions, behavioral patterns, and other characteristics that bear similarities to terrorist leaders on the run.

Q. What is publicly known about the criteria used to select the targets of signature strikes and confirm that these individuals are, in fact, militants?

A. Virtually nothing is publicly known, except that the US sometimes relies on the analysis of patterns of behavior to determine that a particular individual or group is involved in terrorist activities. Such patterns of behavior can presumably derive from signals intelligence, surveillance, human intelligence and so on.

Q. Do the tactical and strategic consequences of signature strikes risk undermining the overall counterterrorism goals or moral authority of the United States?

A. I do not believe signature strikes are *necessarily* either unlawful or tactically and strategically unwise. They are not *per se* unlawful, insofar as one need not know the names of particular individuals in order to have a very high level of certainty that they are actively involved in a serious, imminent attack. The lawfulness of a particular strike would have to be determined on a case by case basis, taking into account the nature and quantity of the evidence.

Similarly, any given strike might well be tactically and strategically wise. That said, this is a context in which perception can matter as much as reality; insofar as signature strikes are perceived by relevant audiences as indiscriminate, they can do the US more harm than good by undermining allied and partner support or by boosting terrorist recruiting efforts.

I am less concerned about signature strikes as such than about the strategic effects of US targeted killings more generally. The problem, in my view, is not the lawfulness or wisdom of a particular strike; the problem is that the entire US targeted killing problem is shrouded in secrecy. The US is, in effect, engaged in a secret war based on secret law, claiming the right to kill any person anywhere on earth at any time, based on secret criteria and secret evidence from unknown sources, evaluated in a secret process by unnamed US government officials, with no transparent mechanism for assessing the consequences of strikes, no external investigation, and no acknowledged or transparent program for remedying mistakes or compensating anyone inadvertently or unlawfully harmed.

This near-total lack of transparency and accountability threatens both US ability to achieve its counterterrorism goals and its moral authority.

I believe that at a minimum, basic rule of law principles require a reasonable degree of transparency about targeting criteria and actual strikes, coupled with reasonable efforts to ensure accountability and remedy mistakes through some independent investigatory mechanism and the provision of compensation when appropriate. Without this, the US risks losing its moral authority, rendering itself vulnerable to legal action in foreign jurisdictions, losing the cooperation of allies and partners, increasing anti-American sentiment and giving terrorists an additional recruiting tool.

2. Your written testimony states that Congress or the Executive Branch should create a non-partisan commission to “review intelligence reports and conduct a thorough policy review of past and current targeted killing policy, evaluating the risk of setting international precedents, the impact of US targeted killing policy on allies, and the impact on broader US counterterrorism goals.” You recommend that this commission issue both classified and unclassified reports.

Q. Please elaborate on this recommendation. How would you define scope of the commission’s substantive responsibility and the specific issues on which it should focus?

A. I believe such a commission should be tasked with:

- I. Articulating the general principles that should govern the use of lethal force by the US government, consistent with US constitutional norms, rule of law norms, and the general normative principles underlying both human rights law and the law of armed conflict. The commission should be tasked with clearly distinguishing between the minimum requirements imposed by US and international law and the principles that should govern the US use of lethal force as a matter of *policy*.
- II. Reviewing selected past US drone strikes to determine if they comport with those principles and applicable legal rules. (It would probably not be feasible for the commission to look at all past strikes, but the commission might select a

representative sample, reviewing them to determine their compliance with applicable legal rules).

- III. Reviewing US targeted killing policy more broadly to determine if it comports with the policy principles previously articulated.
- IV. Evaluating the response to the US targeted killing program in allied and partner nations, looking at public attitudes, pending and potential court challenges, the impact of US policies on allied and partner intelligence sharing and other forms of cooperation, and the impact, if any can be discerned, on extremism and terrorist recruiting;
- V. Evaluating the response to the US targeted killing program in countries in which drone strikes have occurred, looking at public attitudes, pending and potential court challenges, the impact of US policies on intelligence sharing and other forms of cooperation, and the impact, to the degree it can be evaluated, on extremism and terrorist recruiting;
- VI. Evaluating the degree to which US legal and policy justifications for drone strikes and other targeted killings have been invoked by other states, such as Russia and China, which have a history of using repressive measures against dissidents;
- VII. Making recommendations on reform of the overall US targeted killing program, including, if appropriate, recommending that additional investigations be carried out, and identifying the appropriate bodies to carry out such investigations (a court, the commission itself, a special body created by Congress, etc.)
- VIII. The commission should have the authority to make its broad conclusions and recommendations public, subject to the need to protect specific sources and methods.

Which private stakeholders and public entities should be represented on the commission to reflect the range of perspectives?

To be effective, I believe the Commission should include at least the following perspectives:

- One or more retired senior military leaders not personally involved in the targeted killing program;
- One or more retired senior member of the intelligence community not personally involved in the targeted killing program;
- One or more retired senior US diplomats;
- One or more US citizens with high-level experience in the UN system;
- One or more distinguished scholars or think-tank experts with international law, international relations, rule of law, and/or regional and counterterrorism expertise;
- One or more individuals with a human rights NGO background, preferably retired or no longer with an institutional position;
- One or more retired elected officials (former members of Congress)

- If feasible, one or more international members, perhaps retired high-level public officials from allied or partner states.

The Commission should be clearly non-partisan. To be effective, the Commission would need to be made up of individuals who hold or can obtain the relevant security clearances, and the Commission would need access to classified documents. The commission would also need a staff, a budget, and ideally the power to compel the production of documents and witnesses if necessary.

RESPONSES OF PROF. ROSA BROOKS
TO QUESTIONS SUBMITTED BY SENATOR FRANKEN

Senate Judiciary Committee
Subcommittee on Constitution, Civil Rights and Human Rights
Hearing on "Drone Wars: The Constitutional and Counterterrorism Implications of
Targeted Killing"
April 23, 2013

Questions for the Record for Rosa Brooks

Q. The Department of Justice's white paper on the targeted killing of U.S. citizens overseas articulates a novel, and some would say, dangerously broad standard for what would constitute an imminent threat. What do you think are the implications of such a broad standard for imminence?

Traditionally, both international law and domestic criminal law understand the term "imminent" term narrowly: ¹ to be "imminent," a threat cannot be distant or speculative.² But much like the Bush Administration before it, the Obama Administration has put forward an interpretation of the word "imminent" that bears little relation to traditional legal concepts.

According to a leaked 2011 Justice Department white paper³—the most detailed legal justification that has yet become public-- the requirement of imminence "does not require the United States to have clear evidence that a specific attack on U.S. persons and interests will take place in the immediate future." This seems, in itself, like a substantial departure from accepted international law definitions of imminence.

But the White Paper goes further, stating that "certain members of al Qaeda are continually plotting attacks...and would engage in such attacks regularly [if] they were able to do so, [and] the U.S. government may not be aware of all... plots as they are developing and thus cannot be confident that none is about to occur." For this reason, it concludes, anyone deemed to be an operational leader of al Qaeda or its "associated forces" presents, by definition, an imminent threat even in the *absence* of any evidence whatsoever relating to immediate or future attack plans. In effect, the concept of "imminent threat" (part of the international law relating to self-defense) becomes conflated with identity or status (a familiar part of the law of armed conflict).

That concept of imminence has been called Orwellian, and although that is an overused epithet, in this context it seems fairly appropriate. According to the Obama Administration, "imminent"

¹ The most restrictive traditional formulation of the term imminent in international law can be seen in the famous 1837 Exchange of letters between U.S. Secretary of State Daniel Webster and Lord Ashburton, Foreign Secretary of Great Britain, relating to the case of the SS *Caroline*, explaining "imminent attack" as one that is "instant, overwhelming, leaving no choice of means, and no moment for deliberation." More recent approaches have been somewhat more flexible. See, e.g., United Nations Secretary-General's High-level Panel on Threats, Challenges and Change: "A More Secure World: Our Shared Responsibility," at <http://www.un.org/secureworld/>

² See <http://opiniojuris.org/2012/03/07/why-preventive-self-defense-violates-the-un-charter/>

³ See http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf

no longer means “immediate,” and in fact the very *absence* of clear evidence indicating specific present or future attack plans becomes, paradoxically, the basis for assuming that attack may *perpetually* be “imminent.”

The 2011 Justice Department White Paper notes that the use of force in self-defense must comply with general law of war principles of necessity, proportionality, humanity, and distinction. But if US decision-makers generally lack specific knowledge about the nature and timing of future attacks—which the White Paper acknowledges—judgments of necessity and proportionality literally become impossible.

How can one decide if lethal force is necessary to prevent a possible future attack about which one knows nothing? How can proportionality be determined? Here again, the US legal theory underlying targeted killing makes it impossible to apply key principles in a meaningful way. Both necessity and proportionality come to be evaluated in the context of purely hypothetical worst case scenarios (in theory, any terror suspect might be about to unleash another catastrophic attack on the scale of 9/11). As a result, these “limitations” on the use of force establish no limits at all.

Q. The U.S. government has apparently conducted a number of “double tap” strikes, where we have targeted the same location in back-to-back strikes. I am concerned that these sorts of double-hits may place innocent people running to help those injured in the initial strike in great danger. Some critics of these strikes contend they violate the Geneva Conventions. Do you agree, and if so, can you explain why?

I believe that the lawfulness of such double-tap strikes would need to be evaluated on a case-by-case basis. Whether they violate the Geneva Conventions or other international law requirements would depend on the specific circumstances, including, in particular, the degree to which the officials ordering the second strike had information relating to the likelihood that non-targetable civilians are in the area and might be likely to arrive at the scene. In some circumstances, it might be reasonable to conclude that the risk to civilians posed by a second strike was low; in other circumstances, a reasonable decision-maker might conclude that the risk was high. A policy in which “double-tap” strikes are automatically carried out in all circumstances would likely be unlawful, but a policy that permitted second strikes on a case-by-case basis would not be *per se* unlawful.

Q. You testified that you favored repeal of the 2001 AUMF and expressed skepticism about the need for new statutory authority to authorize military force against emerging global threats. Can you elaborate on your reasoning?

Current U.S. targeted killing policy has grown increasingly difficult to justify under the 2001 AUMF, but I believe it is neither necessary nor wise to expand the AUMF to give the president broad additional authorities to use force. Expanding the AUMF would effectively cede to the executive branch powers our Constitution entrusts to Congress. This would undermine the separation of powers scheme so vital to sustaining our constitutional democracy, and could easily lead to an irresponsible and unconstrained executive branch expansion of what has already been termed “the forever war.”⁴

Expanding the AUMF is also wholly unnecessary. Even without any AUMF, the president already has both the constitutional power and the right under international law to use military force to defend the United States from a genuinely imminent attack, regardless of whether the threat emanates from al Qaeda or from some new and unrelated terrorist organization.

If Congress chooses to revise the AUMF, it would be far more appropriate to add geographic and temporal limitations-- or clarify Congress’ assumptions about the nature of the force authorized-- than to expand it. The 2001 AUMF created a domestic legal framework that assumes an indefinitely continuing state of armed conflict and gives the president advance authorization to use force more or less as he chooses, without regard to geography and without regard to the gravity or imminence of any threats posed to the United States. But as the threat posed by Al Qaeda dissipates and U.S. troops begin to withdraw from Afghanistan, it is appropriate for the U.S. to transition to a domestic legal framework in which there is a heightened threshold for the use of military force.

Congressional authorization for the president to use military force should be reserved for situations in which there is a sustained and intense threat to the United States. If this president or any future president identifies a specific new threat of that nature, he can and should provide Congress with detailed information about the threat, and request that Congress authorize the use of military force in a manner tailored to address the specific threat posed by a specific state or organization.

In the event that the president becomes aware of a threat so imminent and grave that it is not feasible for him to seek Congressional authorization prior to using military force, he can rely on his inherent constitutional powers to take appropriate action – by force if needed-- until the threat has been dissipated or until Congress can act. There is simply no need for Congress to preemptively authorize the president to use military force indefinitely against inchoate threats that have not yet emerged.

I addressed this question in much greater detail in testimony delivered at a Senate Armed

⁴ <http://opiniojuris.org/wp-content/uploads/2013-5-7-corrected-koh-oxford-union-speech-as-delivered.pdf>

Services Committee hearing on May 16, 2013. I attach that testimony below.

Q. Can you explain the difference under international law between targeting and killing an operational leader versus someone who is not engaged in active combat, like a cook?

Generally speaking, the international law of armed conflict permits the deliberate targeting of people in two categories: combatants, and civilians who are directly participating in hostilities. Traditionally, “combatants” were members of the armed forces of a state or an organized, hierarchical non-state entity such as an insurgent army, while civilians were those who were not members of such armed forces. The principle of “distinction” requires that parties to a conflict must attempt to distinguish between combatants and civilians, and must refrain from targeting civilians not directly participating in hostilities.

During an armed conflict, enemy combatants are always lawful targets by virtue of their combatant *status* rather than because of their actions: thus, enemy combatants could be lawfully targeted while sleeping, for instance. Similarly, a uniformed enemy soldier in wartime would be a lawful target even if his assigned duties are as a cook, and even if he is shot while cooking. (Note that there are some exceptions to the general rule that combatants are always targetable, insofar as an enemy combatant who has surrendered or been taken prisoner cannot be targeted, etc.).

Civilians, on the other hand, are only targetable if they are taking *direct* part in “hostilities.” Traditionally, for instance, this meant that a civilian could be targeted if he or she actually picked up a weapon and used it or threatened to use it against an opposing force, but he or she could not be targeted while sleeping, cooking, or engaging in other activities not “directly” part of hostilities.

The challenge of combating terrorist violence has somewhat blurred the categories of “combatants” and “civilians participating directly in hostilities,” however, since Al Qaeda and associated groups are not organized in the same manner as traditional military forces (they don’t wear uniforms, carry identification, or openly identify themselves as combatants) and do not “fight” on traditional “battlefields.” It has therefore grown ever harder to place suspected terrorist affiliates into these categories. It is not clear from the applicable legal standards whether terrorist “operatives” should properly be considered “combatants” or “civilians directly participating in hostilities,” for instance.

Moreover, given the nature of terrorist activities, it has also grown harder to define “direct participation” or “hostilities” with any clarity. Thus, while most would agree that the wife of a terrorist “operative” is a civilian who is not targetable as long as she does not directly assist in planning or carrying out an attack, she might become targetable if she (for instance) transported bomb-making materials from one place to another to aid in attack preparations. Similarly, whether a cook is targetable would depend on whether he is considered a “member” of a combatant group (and therefore always targetable) or whether he is considered a civilian who can’t be targeted if all he does is cook, which presumably is not “direct” participation in “hostilities.”

In this sense, international law does not provide clear guidance on whether and when support personnel such as cooks are targetable. However, all use of lethal force in armed conflicts must comport with the principles of necessity and proportionality as well as the principle of distinction. Thus, the use of lethal force against a cook might not be necessary, even if the cook could lawfully be considered targetable.

Q. If the U.S. government is classifying all military-age males in a drone strike as active combatants, would this violate the principle of distinction? If so, please explain why and whether you think the U.S. government should adhere to this principle.

The US is obligated to adhere to the principle of distinction, both as a matter of international law and US domestic law, which incorporates key tenets of the international law of armed conflict. Among other things, failing to comply with the principle of distinction might be deemed to constitute the willful killing of protected persons, which would be a grave breach of the Geneva Conventions and a violation of 18 USC Section 2441 (The War Crimes Act).

In general, assuming all military-age males in a particular geographic to be combatants would appear on its face to violate the principle of distinction. Complying with the principle of distinction requires those using lethal force during an armed conflict to make their best efforts to distinguish between lawful targets and protected persons (e.g., civilians not directly participating in hostilities); it is difficult to imagine that assuming all military-age males to be combatants could possibly constitute best efforts.

That said, there might be *particular circumstances* in which it *would* be reasonable to consider all military-age males targetable: thus, for instance, if a party to a conflict had reliable information indicating that a compound in an isolated area was used solely as a training base for enemy forces and was off-limits to all others, in that context it might well be reasonable to regard all military-aged males in the building and its immediate vicinity as presumptive combatants.

ATTACHMENT TO RESPONSES OF PROF. ROSA BROOKS
TO QUESTIONS SUBMITTED BY SENATOR FRANKEN

**The Law of Armed Conflict, the Use of Military Force,
and the 2001 Authorization for Use of Military Force**

May 16, 2013

Statement for the Record Submitted the Senate Committee on Armed Services

By

Rosa Brooks

Professor of Law, Georgetown University Law Center
Bernard L. Schwartz Senior Fellow, New America Foundation

Chairman Levin, Ranking Member Inhofe and members and staff of the Committee on Armed Services, thank you for giving me the opportunity to testify today on the law of armed conflict, the use of military force, and the 2001 Authorization for Use of Military Force (AUMF). These are extraordinarily important issues, and I appreciate your commitment to taking a fresh look at them.

I am a law professor at Georgetown University, where I teach courses on international law, constitutional law and national security issues. I am also a Bernard L. Schwartz Senior Fellow at the New America Foundation, and I write a weekly column for *Foreign Policy* magazine. From April 2009 to July 2011, during a public service leave of absence from Georgetown, I had the privilege of serving as Counselor to the Undersecretary of Defense for Policy at the Department of Defense. This testimony reflects my personal views only, however.

Mr. Chairman, almost twelve years have gone by since the passage of the AUMF on September 14, 2001. The war in Afghanistan – the longest war in U.S. history-- has begun to wind down. But at the same time, a far more shadowy war has quietly accelerated.

I am referring to what many have called the “drone war”: the increased use of military force by the United States outside of traditional, territorially bounded battlefields,¹ carried out primarily, though not exclusively,² by missile strikes from remotely piloted aerial vehicles.³ In recent years this shadowy war has spread ever further from “hot” battlefields, migrating from

¹ I will use the term “hot battlefields” interchangeably with “traditional battlefields,” “traditional territorially bounded battlefields” or “active theaters of combat.” The intent is not to assert that there is a clear legal distinction between these concepts (that, after all, is part of what is at issue today), but rather to distinguish descriptively between bounded geographical locations in which the existence of an armed conflict is legally uncontroversial and universally acknowledged -- such as Afghanistan, or Iraq prior the the withdrawal of U.S. troops -- and situations in which the existence of an armed conflict and/or the applicability of the law of armed conflict is precisely what is controversial.

² While drone strikes have garnered the most media attention, most of the analysis in this testimony applies equally to strikes carried out by manned aircraft and to strikes or raids that involve “boots on the ground,” such as those carried out by Special Operations Forces.

³ These have variously been termed “drones,” “unmanned aerial vehicles,” and “remotely piloted vehicles.” I will generally use the term “drone” as shorthand.

Afghanistan and Iraq to Yemen, Pakistan and Somalia, and perhaps to Mali and the Philippines as well.⁴

As you know, most information about U.S. drone strikes and other U.S. uses of military force outside “hot battlefields” remains classified. As a result, virtually all of what is publicly known has had to be pieced together from leaked U.S. government documents, court filings, NGO and media investigations and occasional statements from government officials of foreign states. Everything in this testimony is therefore subject to the caveat that I can only comment on publicly available information, which is inevitably partial and (in some cases potentially misleading).

Subject to that caveat, however, it appears that U.S. drones strikes, which began as a tool used in extremely limited circumstances to target specifically identified high-ranking al Qaeda officials, have become a tool relied on to go after an ever-lengthening list of bad actors, many of whom appear to have only tenuous links to al Qaeda and the 9/11 attacks, and many of whom arguably pose no imminent threat to the United States. Some of these suspected terrorists have been identified by name and specifically targeted, while others have reportedly been targeted solely on the basis of behavior patterns deemed suspect by U.S. officials.⁵

We also appear increasingly to be targeting militants who are lower and lower down the terrorist food chain,⁶ rather than high-ranking terrorist planners and operatives.⁷ Although drone strikes are thought to have killed well over 3,000 people since 2004,⁸ analysis by the New America Foundation and more recently by the McClatchy newspapers suggests that only a small fraction of the dead appear to have been so-called “high-value targets.”⁹

The increasing use of weaponized drones to target individuals who only tenuous links to Al Qaeda and the 9/11 attacks raises critical legal and policy questions, particularly when such drone strikes occur outside of traditional battlefields. Most pertinent for today’s hearing, such strikes raise significant domestic legal questions about whether current U.S. targeted killing policy is fully in conformity with Congress’ 2001 Authorization for use of Military Force.

In my view, current U.S. targeted killing policy has grown increasingly difficult to justify under the 2001 AUMF. As I will discuss, however, I believe it is neither necessary nor wise to expand the AUMF to give the president broad additional authorities to use force. Expanding the AUMF would effectively cede to the executive branch powers our Constitution entrusts to Congress. This would undermine the separation of powers scheme so vital to sustaining our constitutional democracy, and could easily lead to an irresponsible and unconstrained executive branch expansion of what has already been termed “the forever war.”¹⁰

⁴ See http://www.longwarjournal.org/threat-matrix/archives/2012/06/did_the_us_launch_a_drone_strike.php and <http://www.brookings.edu/research/opinions/2012/03/05-drones-philippines-ahmed>

⁵ So called “signature strikes.”

⁶ See http://articles.cnn.com/2012-09-05/opinion/opinion_bergen-obama-drone_1_drone-strikes-drone-attacks-drone-program

⁷ See <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/20/AR2011022002975.html>

⁸ See <http://counterterrorism.newamerica.net/drones>

⁹ See <http://counterterrorism.newamerica.net/drones>; <http://www.mcclatchydc.com/2013/04/09/188062/obamas-drone-war-kills-others.html#.UZf-Xncq9QI>; and <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/20/AR2011022002975.html>

¹⁰ <http://opiniojuris.org/wp-content/uploads/2013-5-7-corrected-koh-oxford-union-speech-as-delivered.pdf>

Expanding the AUMF is also wholly unnecessary. Even without any AUMF, the president already has both the constitutional power and the right under international law to use military force to defend the United States from an imminent attack, regardless of whether the threat emanates from al Qaeda or from some new and unrelated terrorist organization.

If Congress chooses to revise the AUMF, it would be far more appropriate to add geographic and temporal limitations-- or clarify Congress' assumptions about the nature of the force authorized-- than to expand it. The 2001 AUMF created a domestic legal framework that assumes an indefinitely continuing state of armed conflict and gives the president advance authorization to use force more or less as he chooses, without regard to geography and without regard to the gravity or imminence of any threats posed to the United States. But as the threat posed by Al Qaeda dissipates and U.S. troops begin to withdraw from Afghanistan, it is appropriate for the U.S. to transition to a domestic legal framework in which there is a heightened threshold for the use of military force.

Congressional authorization for the president to use military force should be reserved for situations in which there is a sustained and intense threat to the United States. If this president or any future president identifies a specific new threat of that nature, he can and should provide Congress with detailed information about the threat, and request that Congress authorize the use of military force in a manner tailored to address the specific threat posed by a specific state or organization.

In the event that the president becomes aware of a threat so imminent and grave that it is not feasible for him to seek Congressional authorization prior to using military force, he can rely on his inherent constitutional powers to take appropriate action -- by force if needed-- until the threat has been dissipated or until Congress can act. There is simply no need for Congress to preemptively authorize the president to use military force indefinitely against inchoate threats that have not yet emerged.

Mr. Chairman, the United States is usually credited with the first modern codification of the rules of armed conflict. In 1863, President Abraham Lincoln signed General Order #100, "Instructions for the Government of Armies of the United States in the Field" -- better known as the Lieber Code -- outlining the core rules of armed conflict with which he expected the Union Army to comply. In Article 29, the Lieber Code makes a bold declaration: "Peace is [the] normal condition; war is the exception. The ultimate object of all modern war is a renewed state of peace."¹¹

This rings as true today as in 1863, when the U.S. faced a truly existential threat. And it invites us to ask a broad policy question in addition to a legal question: do we *want* to live in a world of perpetual, open-ended war? And if not, how do we begin to turn the page on the 9/11 era? What Congressional action will ensure that we retain the ability to protect ourselves when

¹¹ http://avalon.law.yale.edu/19th_century/lieber.asp

necessary, while at the same time ensuring that peace, rather than war, once again becomes our norm?

Difficult as this question is, I am certain of one thing: an expanded AUMF will do nothing to prevent a “forever war.” On the contrary, it would likely lead only to thoughtless further expansion of our current shadowy drone war -- and this, I believe, would both undermine the rule of law and represent an act of supreme strategic folly.

Moving well beyond the issue of the AUMF, U.S. drone strikes outside traditional battlefields also raise significant questions about U.S. compliance with international law principles, and even about what international legal framework is the appropriate framework for evaluating current U.S. targeted killing policy. Is it the international law of armed conflict? The international law concerning the right of states to use force in self-defense? International human rights law? Some combination of all these, or a different framework depending on the factual circumstances unique to each situation? Even more broadly, current U.S. policy raises grave questions about what it means to respect the rule of law when the law itself appears to be ambiguous or indeterminate.

I recently testified at a hearing on “The Constitutional and Counterterrorism Implications of Targeted Killing” held by the Senate Judiciary Committee’s Subcommittee on the Constitution, Civil Rights and Human Rights. In my written statement submitted for the record for that April 23 hearing (see Appendix), I addressed a number of broader issues that I believe are also of interest to the Committee on Armed Services.

Specifically, my April 23 testimony discussed what I view as some of the most common but *unfounded* criticisms of U.S. drone strikes, and identified some advantages of using drones as weapons delivery systems. I argued that drones present no new legal issues *as such*, but drone technologies lower the perceived costs of using lethal force across borders; as a result, they have facilitated a steady expansion of the use of force beyond traditional battlefields, which will likely have long-term strategic costs for the United States.

My April 23 testimony also addressed the significant rule of law challenges posed by current U.S. targeted killing policy. I discussed the international legal framework in which U.S. drone strikes occur, focusing specifically on the law of armed conflict and the international law of self-defense, and arguing that existing international law frameworks offer only ambiguous guidance with regard to the legality of U.S. targeted killings. This creates a grave rule of law problem: when the legal framework for assessing U.S. targeted killings is uncertain and contested, the “legality” of such killings becomes effectively indeterminate. My April 23 testimony also addressed the question of what precedent U.S. targeted killing policy risks setting for other less scrupulous nations, and concluded by highlighting a number of possible ways for Congress to ensure that U.S. targeted killing policy does not continue to undermine vital rule of law norms.

Rather than restate these arguments in this testimony prepared for the Committee on Armed Services, I will focus today solely on questions relating to the 2001 AUMF. However, I am including as an appendix to today’s written testimony the statement I submitted on April 23

to the Judiciary Committee's Subcommittee on the Constitution, Civil Rights, and Human Rights, and I respectfully request that you consider it part of the record for today's hearing as well.

The 2001 Authorization for use of Military Force

Mr. Chairman, our Constitution gives Congress vital powers relating to the use of military force. To Congress is given the power to declare war and the power to raise, support and make rules regulating the armed forces and to make rules concerning "captures on land and water." To Congress is also given the constitutional power to call forth "the militia to execute the laws of the Union, suppress insurrections and repel invasions," as well as the power to "define and punish... offenses against the law of nations." The Constitutional grant of these powers to Congress is essential to our scheme of separation of powers, and Congress has rightly been vigilant against executive usurpation of its constitutional prerogatives.

The original AUMF was passed on September 14, 2001. It gives the president Congressional blessing to

"[U]se 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."¹²

Mr. Chairman and Senator Inhofe, as you and your colleagues on this committee undoubtedly recall, the Bush Administration initially proposed a broader, more open-ended AUMF, one that would authorize the use of force to "deter and pre-empt any future acts of terrorism or aggression against the United States."¹³ But even in those frightening days right after the 9/11 attacks—even as bodies continued to be pulled from the rubble of the Pentagon and the Twin Towers—Congress refused to give the executive branch what would have amounted to an unnecessary and open-ended declaration of permanent war against an inchoate, undefined enemy.

Congressional power once ceded to the executive branch tends never to be regained, and in 2001, Congress rightly wished to ensure that its authorization to use force would not end up eviscerating its vital role in the constitutional scheme. As a result, the language of the 2001 AUMF was drafted with great care. The 2001 AUMF is *forward looking*, insofar as its language

¹² Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (codified at 50 U.S.C. § 1541 note).

¹³ See 147 CONG. REC. S9950-51 (daily ed., Oct. 1, 2001) (statement of Sen. Byrd) (providing the text of the Administration's initial proposal); see also *id.* at S9949 ("[T]he use of force authority granted to the president extends only to the perpetrators of the September 11 attack. It was not the intent of Congress to give the president unbridled authority . . . to wage war against terrorism writ large without the advice and consent of Congress. That intent was made clear when Senators modified the text of the resolution proposed by the White House to limit the grant of authority to the September 11 attack.").

is focused on prevention rather than retaliation; but it is also *backward looking*, insofar as force is explicitly authorized only against those with responsibility for the 9/11 attacks.

The 2001 AUMF does not authorize the U.S. of military force against *every* terrorist or anti-U.S. extremist the world contains. Instead, it focuses squarely on those “nations, organizations, or persons who specifically “planned, authorized, committed, or aided” the 9/11 attacks, as well as those who “harbored” such organizations or persons.

The AUMF also does not authorize force for the open-ended purpose of preventing any and all future acts of terrorism. Instead, it authorizes force for a limited and defined purpose: “to prevent any future acts of international terrorism *against the United States* by *such* nations, organizations or persons.” (emphasis added). This language, on its face, does *not* authorize the use of force for the purpose of preventing terrorist acts *not* directed against U.S. territory or U.S. persons, and it also does *not* authorize the use of force for the purpose of preventing terrorist attacks by nations, organizations or persons who with no culpability for 9/11. Furthermore, as the U.S. Supreme Court has several times emphasized, the AUMF must be construed as authorizing force only to the degree that it is also consistent with the international laws of war. This in turn means that any use of force under the AUMF must be consistent with longstanding law of war principles relating to necessity, proportionality, humanity and distinction.¹⁴

For much of the last dozen years, the AUMF provided adequate domestic legal authority both for the conflict in Afghanistan and for most U.S. drone strikes outside hot battlefields, since most of the individuals targeted in early U.S. strikes were reportedly senior Taliban or Al Qaeda operatives. Early U.S. drone strikes could of course still be criticized on other grounds—as strategically foolish, or as lacking in transparency and protections against abuse¹⁵ -- but strictly from the perspective of domestic authorizing legislation, most of the early U.S. drones strikes appeared comfortably within the scope of the congressionally-granted authority to use force. I believe that this has changed in the last few years.

The 9/11 attacks have receded into the past, the war in Iraq -- which had its own independent AUMF¹⁶ -- is over, the war in Afghanistan is winding down, and Al Qaeda no longer poses the urgent, intense and sustained threat it posed in September 2001. As former Secretary of Defense Leon Panetta said in November 2012, the “core” of Al Qaeda has been “decimated.”¹⁷ In his March 2013 testimony before the Senate Select Committee on Intelligence, Director of National intelligence James Clapper similarly observed that “core” Al Qaeda has been “degraded...to a point that the group is probably unable to carry out complex, large-scale attacks in the West.”

This does not, of course, mean that the world no longer contains any terrorists or anti-U.S. extremists. The world is unfortunately replete with people who resent the United States or

¹⁴ See *Hamdan v. Rumsfeld*, 548 U.S. 557, 594–95 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507, 519–21 (2004) (plurality opinion).

¹⁵ See, e.g., Rosa Brooks, *Take Two Drones and Call me in the Morning*, *Foreign Policy*, Sept. 12, 2012. Available at http://www.foreignpolicy.com/articles/2012/09/12/take_two_drones_and_call_me_in_the_morning

¹⁶ http://en.wikipedia.org/wiki/Iraq_Resolution

¹⁷ Hon. Leon Panetta, Sec’y of Def., “The Fight Against Al Qaeda: Today and Tomorrow,” Speech Before the Center for a New American Security (Nov. 20, 2012), available at <http://www.cfr.org/defense-strategy/panettas-speech-al-qaeda-november-2012/p29547>.

oppose U.S. policies. Some subset of those people self-identify with the distorted brand of Islam favored by Al Qaeda and the Taliban, and a further subset may be willing to use violence to further their ends.¹⁸

Not all these people and organization pose serious or urgent threats to the United States, however. I am not privy to classified military or intelligence evaluations of the capabilities of foreign terrorist organizations, but publicly available information suggests that while extremists and terrorists abound, few have both the intent and the ability to plan and implement actual attacks against the United States.

Indeed, in his March 2013 testimony SSCI testimony, DNI James Clapper did not highlight any organization known to have both the current intent and the current capacity to carry out attacks against the United States. He noted, for instance, that Al Qaeda in the Arabian Peninsula (AQAP) continues to view attacks on U.S. soil as “part of [its] transnational strategy,” but he also suggested that AQAP has regional and internal priorities that its leaders may view as taking precedence over U.S. operations, given its limited number of “individuals who can manage, train, and deploy operatives for U.S. operations.”¹⁹ DNI Clapper suggested that other known international terrorist organizations are primarily local or regional in their interests and reach. Al Qaeda in Iraq’s “goals inside Iraq will almost certainly take precedence over U.S. plotting,” while “Somalia-based al-Shabaab will remain focused on local and regional challenges.” Clapper offered similar assessments of Syria’s al Nusra Front, Al Qaeda in the Islamic Maghreb (AQIM), Nigeria’s Boko Haram and Pakistan’s Lashkar-e-Tayibba.

Nevertheless, the publicly available evidence suggests that the United States continues to use military force outside hot battlefields not only against the remnants of “core” al Qaeda and the Taliban, but also against known or suspected members of other organizations-- including Somalia’s al Shabaab -- as well as against individuals identified by U.S. intelligence only as “militants,” “foreign fighters” and “unknown extremists.”²⁰

Insofar as such groups and individuals were unconnected to the 9/11 attacks and are not planning or carrying out terrorist attacks against the United States, the use of force against these groups and individuals-- at least outside of traditional battlefields -- does not appear to be authorized by the 2001 AUMF.

The Obama administration has countered this argument by asserting that insofar as Congress intended the AUMF to be the functional equivalent of a declaration of war, the AUMF must be read to include the implied law of war-based authority to target groups that are “associates” of Al Qaeda or the Taliban.

However, it is not clear that Congress intended to authorize the use of force *outside* of traditional territorial battlefields against mere “associates” of those responsible for the 9/11 attacks. It is also not clear how the executive branch defines “associates” of al Qaeda, and the

¹⁸ Arguably, post-9/11 U.S. counterterrorism policy has increased, rather than decreased, the number of people in this category.

¹⁹ <http://www.intelligence.senate.gov/130312/clapper.pdf>

²⁰ <http://www.mcclatchydc.com/2013/04/09/188062/obamas-drone-war-kills-others.html#.UZf-Xncq9QI>

Obama Administration has not offered any public explanation of which groups it considers to be “associates” of Al Qaeda or the Taliban.

The international law of war unquestionably permits parties to a conflict to target “co-belligerents” of the enemy. On a traditional battlefield—such as within the territorial confines of Afghanistan—it would clearly be permissible for the U.S. to target individuals and groups that are fighting alongside the Taliban or Al Qaeda.²¹ It is less clear that this is the case outside “hot battlefields.” In this murkier context, it is far harder to determine what would constitute “co-belligerency” with Al Qaeda, and executive branch officials have provided no clear criteria, nor even a simple list of those it regards as “associates” under a co-belligerency theory.

As a result, there is a real danger that the Administration’s assertion that the AUMF authorizes the use of force against AQ “associates” even outside of traditional battlefields could become a backdoor way of expanding the AUMF far beyond Congress’ intent.

As noted earlier, in 2001 Congress refused to acquiesce in Bush Administration proposals to that the AUMF authorize force to “deter and pre-empt any future acts of terrorism or aggression,” and instead opted for language that was far more specific and limiting. If Congress now accepts Obama Administration claims that force can be used against a broad category of persons and organizations determined (based on unknown criteria) to be AQ “associates,” this would effectively turn the AUMF into precisely the open-ended authorization to use force that Congress chose to avoid in 2001.

Congress bears some responsibility for enabling the executive branch to assert such virtually unlimited authority to use force, however. In the 2006 and 2009 Military Commissions Acts, for instance, Congress gave military commissions jurisdiction over individuals who are “part of forces *associated* with Al Qaeda or the Taliban,” along with “those who purposefully and materially support such forces in hostilities against U.S. Coalition partners.”²²

This allowed the Bush Administration and later the Obama Administration to argue that if Congress considers it appropriate for U.S. military commissions to have *jurisdiction* over AQ and Taliban associates—including over those “associates” who were detained in geographical locations far from traditional battlefields-- Congress *must* believe the executive branch has the authority to *detain* such associates found far from traditional battlefields, and the authority to detain must stem from the authority to use force. Indeed, by 2009 the Obama Administration was arguing in court that at least when it comes to detention, the AUMF implicitly authorizes the president “to detain persons who were part of, or substantially *supported*, Taliban or al-Qaida forces or *associated forces* that are engaged in hostilities against the United States *or its coalition partners*.”²³ (My emphasis).

²¹ Indeed, the AUMF notwithstanding, the U.S. would be justified under international self-defense principles in using force against persons or organizations posing an imminent threat to U.S. personnel, subject to the principles of necessity and proportionality.

²² See, e.g., Military Commissions Act of 2006 (2006 MCA), Pub. L. No. 109-366, 120 Stat. 2600 (codified in part at 28 U.S.C. § 2241).

²³ <http://www.justice.gov/opa/documents/memo-re-det-auth.pdf>

But note how far this has shifted from the original language of the AUMF: at least with regard to detention, the administration's focus is no longer merely on those who were directly complicit in the 9/11 attacks, but on a far broader category of individuals. This broadened understanding of executive *detention* authority was later given the congressional nod in the 2012 NDAA, which used virtually identical language.²⁴

The key subsequent move in the executive branch's gradual expansion of the scope of the 2001 AUMF was the conflation of detention authority with the authority to target using lethal force. Logically, as the Supreme Court noted in 2004,²⁵ a party to a conflict must have the power to lawfully detain all persons it has the lawful power to kill. The greater power must include the lesser: if it would be lawful to shoot an enemy combatant, it must be lawful to capture and hold him instead. Working backward from this principle, the Obama Administration appears to have reasoned that if it is lawful to detain an individual, it is equally lawful to use force against him.

This does not follow: while the existence of the greater power implies the existence of the lesser power, Congressional authorization of the lesser power (detention) should not be construed – in the absence of express, unambiguous manifestations of Congressional intent-- to include Congressional authorization of the greater power (the use of military force to target and kill “associates” of Al Qaeda). However, Congress’ failure to clarify its intent with regard to the AUMF has enabled the executive to read Congressional silence as approval.

Notwithstanding executive branch efforts to shoehorn the vague category of “associates” into the AUMF, few would dispute that as the “drone war” expands, it has become more and more difficult to view all current Obama administration uses of force as congruent with the limited authorities granted by Congress on September 14, 2011. In February 2012, then-Pentagon General Counsel Jeh Johnson insisted that the 2001 AUMF remains the domestic legal “bedrock” of the military’s drone strikes,²⁶ and Administration representatives have repeatedly affirmed this view. But as a recent Hoover Institution white paper authored by former Obama official Bobby Chesney, former Bush officials Jack Goldsmith and Matt Waxman and the Brookings Institution’s Ben Wittes concludes, “in a growing number of circumstances, drawing the requisite connection to the AUMF requires an increasingly complex daisy chain of associations—a task that is likely to be very difficult... in some cases, and downright impossible in others.”²⁷

John Bellinger, former State Department Legal Advisor under President Bush, is equally blunt: the AUMF is “getting a little long in the tooth.” Like it or not, the language of the AUMF is still clearly “tied to the use of force against the people who planned, committed, and or aided

²⁴ See FY2012 NDAA § 1021(b)(2), 125 Stat. at 1562 (authorizing detention of “A person who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces”).

²⁵ *Hamdi v. Rumsfeld*, <http://www.law.cornell.edu/supct/html/03-6696.ZS.html>

²⁶ <http://www.cfr.org/counterterrorism/targeted-killings/p9627>

²⁷ Robert Chesney et al., Hoover Inst., A Statutory Framework for Next-Generation Terrorist Threats (2013), <http://media.hoover.org/sites/default/files/documents/Statutory-Framework-for-Next-Generation-Terrorist-Threats.pdf>.

those involved in 9/11," says Bellinger. "The farther we get from [targeting] al-Qaeda, the harder it is to squeeze [those operations] into the AUMF."²⁸

If the Administration's use of force outside traditional battlefields is increasingly hard to justify under the AUMF, what should Congress do in response?

Congress could, of course, choose to do in 2013 what it refused to do in 2001, and broaden the existing AUMF to expressly permit the executive branch to use force to deter or preempt any future attacks or aggression towards the United States or U.S. interests. But such an expansion of the AUMF would give this and all future Administrations virtual carte blanche to wage perpetual war against an undefined and infinitely malleable list of enemies, without any time limits or geographical restrictions.

In my view, this would amount to an unprecedented abdication of Congress's constitutional responsibilities. In effect, Congress would be delegating its war powers almost wholesale to the executive branch. And while such a broad authorization to use military force could in theory be narrowed or withdrawn by a subsequent Congress, history suggests that the expansion of executive power tends to be a one-way ratchet: power, once ceded, is rarely regained.

Mr. Chairman, my guess is that few members of this committee would wish to contemplate such a broadened AUMF. What is more, it is worth emphasizing once again that while the Bush administration requested such open-ended authority to use force immediately after 9/11, Congress refused to provide it – even at a moment when the terrorist threat to the United States was manifestly more severe than it is now.

Today, the Obama Administration has not requested or suggested that it sees any need for an expanded AUMF. It would be utterly unprecedented for Congress to give the executive branch a statutory authorization to use force when the president has not requested it.

Similar flaws characterize proposals to revise the AUMF to permit the president to use force against any organizations he may, in the future, specifically identify as posing a threat to the United States, based on criteria established by Congress. This is the proposal made by the Hoover Institute White Paper co-authored by my colleague Jack Goldsmith. He and his co-authors argue that Congress could pass a revised AUMF containing "general statutory criteria for presidential uses of force against new terrorist threats but requir[ing] the executive branch, through a robust administrative process, to identify particular groups that are covered by that authorization of force."

While it would surely be useful for Congress to provide greater clarity on what, in its view, constitutes a threat sufficient to justify the open-ended use of military force -- amounting to a declaration of armed conflict-- such a revised AUMF would still effectively delegate to the president constitutional powers properly entrusted to Congress. Once delegated, these powers

²⁸ http://www.washingtonpost.com/world/national-security/administration-debates-stretching-911-law-to-go-after-new-al-qaeda-offshoots/2013/03/06/fd2574a0-85e5-11e2-9d71-f0feafdd1394_print.html

would be difficult for Congress to meaningfully oversee or dial back—and, once again, it is notable that the president has not requested such a power.

Mr. Chairman, Senator Inhofe, if what we're concerned about is protecting the nation, there is no need for an expanded AUMF. With or without the 2001 AUMF, no one disputes that the president has the constitutional authority (and the international law authority) to use military force if necessary to defend the United States from an imminent attack, regardless of whether the threat emanates from al Qaeda or from some as yet unimagined terrorist organization.

If Congress chooses to revise the AUMF, it would be far more appropriate to limit it than to expand it. The 2001 AUMF established – at least as a matter of domestic U.S. statutory law-- an indefinitely continuing state of armed conflict between the United States, on the one hand, and those responsible for the 9/11 attacks, on the other hand. This has enabled the executive branch to argue (both as a matter of U.S. law and international law) that it is the principles of the law of armed conflict (LOAC) that should govern the U.S. use of armed force for counter-terrorism purposes. But if the law of armed conflict is the applicable legal framework through which to understand the AUMF and through which to evaluate U.S. drone strikes outside of traditional battlefields, there are very few constraints on the U.S. use of armed force, and no obvious means to end the conflict.

Compared to other legal regimes, including both domestic law enforcement rules and the international law on self defense, the law of armed conflict is extremely permissive with regard to the use of armed force. The law of armed conflict permits the targeting both of enemy combatants and their co-belligerents. It also allows enemy combatants to be targeted by virtue of their status, rather than their activities: it is permissible to target enemy combatants while they are sleeping, for instance, even though they pose no “imminent” threat while asleep, and the lowest-ranking enemy soldier can be targeted just as lawfully as the enemy’s senior-most military leaders. Indeed, uniformed cooks and clerks with no combat responsibilities can be targeted along with combat troops.

It is this highly permissive law of armed conflict framework that has enabled the executive branch to assert that “associates” of al Qaeda and the Taliban may be targeted beyond traditional battlefields, even though this expansion of the use of force beyond those responsible for 9/11 was not contemplated by Congress in the 2001 AUMF. Similarly, it is the law of armed conflict framework that has permitted the executive branch to assert the authority to target ever lower-level terrorists and suspected “militants,” rather than restricting drone strikes to those targeting the most dangerous “senior” operatives. It is also the law of armed conflict framework that permits the executive branch to assert that it may target even those individuals and organizations that pose no imminent threat to the United States, in the normal sense of the word “imminent.”

But as the threat posed by Al Qaeda dissipates and U.S. troops withdraw from Afghanistan, it is appropriate for the U.S. to transition to a domestic (and international) legal framework in which there are tighter constraints on the use of military force. Congress can help this transition along by clarifying that the existing AUMF is not an open-ended mandate to wage a “forever war,” and requiring the president to satisfy more exacting legal standards before

military force is authorized or used.

In the event that the president becomes aware of a threat so imminent and grave he cannot wait for Congressional authorization prior to using military force, there is no dispute that he can rely on his inherent constitutional powers to take appropriate action until the threat has been eliminated or until Congress can act. However, by expressly granting the power to declare war and associated powers to Congress, our Constitution presumes that the president will only in rare circumstances rely solely on his inherent executive powers to use military force. Historically, non-congressionally authorized uses of force by the president have generally been reserved for rare and unusual circumstances, and this is as it should be.

Beyond these rare situations of extreme urgency, if the president believes that there is a sustained and intense threat to the United States, he can and should provide Congress with detailed information about the threat, and request that Congress authorize the use of military force to address the *specific* threat posed by a *specific* state or organization.

Congress should authorize the use of military force in these circumstances *only* -- there is no need for Congress to preemptively authorize the president to use military force indefinitely against unspecified threats that the president has not yet identified. And if Congress *does* authorize the use of military force at the president's request, the force authorized should be carefully tailored to the specific threat. Furthermore, Congress should be explicit about whether an AUMF is acknowledging or authorizing an ongoing armed conflict, on the one hand, or whether it is simply authorizing the limited use of force for self-defense, on the other hand.

International law imposes criteria for the use of force in national self-defense that are far more stringent than the criteria for using force in the course of an armed conflict that is ongoing. Unlike the international law of armed conflict, the international law of self-defense permits states to use force only to *respond* to an armed attack or to prevent an *imminent* armed attack, and the use of force in self defense is subject to the principles of necessity and proportionality. Under self defense rules (unlike law of armed conflict rules) individuals who pose no imminent threat cannot be targeted, and inquiries into imminence, necessity and proportionality tend to restrict the use of force in self defense to strikes against those who— by virtue of their operational seniority or hostile activities- pose threats that are urgent and grave, rather than speculative, distant or minor.

For this reason, I believe that if Congress wishes to refine or clarify the AUMF, it should consider limiting the AUMF's geographic scope, limiting its temporal duration, limiting the authorized use of force to that which would be considered permissible self defense under international law, or all three.

Expressly limiting the AUMF's geographic scope to Afghanistan and/or other areas in which U.S. troops on the ground are actively engaged in combat, for instance, would clarify that the *ongoing* armed conflict (and the applicability of the law of armed conflict) is limited to these more traditional battlefield situations. As noted above, such a geographical limitation would by no means undermine the president's ability to use force to protect the United States from threats emanating from outside of the specified region. Such a geographical limitation would merely

make it clear that any presidential desire to use force elsewhere would require him either to request an additional narrowly drawn congressional authorization to use force, or would require that any non-congressionally authorized use of force be justified -- constitutionally and internationally -- on self defense grounds, by virtue of the gravity and imminence of a specific threat.

Limiting the AUMF's temporal scope could be accomplished by adding a "sunset" provision to the AUMF. The current AUMF could be set to expire when U.S. troops cease combat operations in Afghanistan, for instance, or in 2015, whichever date comes first. Here again, such a limitation would not preclude the president from requesting an extension or a new authorization to use force, if clearly justified by specific circumstances, nor would it preclude the president from relying on his inherent constitutional powers if force becomes necessary to prevent an imminent attack.

Finally, the AUMF could be revised to clarify Congress' view of the applicable legal framework. Congress could state explicitly that it authorizes the president to engage in an ongoing armed conflict within the borders of Afghanistan between the U.S. and Al Qaeda, the Taliban and their co-belligerents, but that it does not currently authorize the initiation or continuation of an armed conflict in any other place, and expects therefore that any U.S. military action elsewhere or against other actors shall be governed by principles of self-defense rather than by the law of armed conflict.

There are many possible ways for Congress to signal its commitment to preventing the AUMF from being used to justify a "forever war." Each of these approaches has both benefits and drawbacks, and each would require significant further discussion. But I believe that Congress' focus should be on ensuring that war remains an exceptional state of affairs, not the norm. At a minimum, this should preclude any Congressional expansion of existing AUMF authorities.

Mr. Chairman, let me close with a plea for perspective. We live in a dangerous world: adversarial states such as North Korea and Iran remain bellicose; the changing role of near-peer powers such as China and Russia poses challenges to U.S. interests and global stability; the Middle East remains awash in violence, and technological advances could place lethal tools in the hands of irresponsible actors. We also face unprecedented challenges from our increased global interdependence: climate change, the interdependence of global financial systems and our ever-increasing reliance on the internet all create new vulnerabilities. Against the backdrop of these many dangers, old and new, the fear of terrorist attack should not be the primary driver of U.S. national security policy.

Terrorism is a very real problem, and we cannot ignore it, any more than we should ignore violent organized crime or large-scale public health threats. Like everyone else, I worry about terrorists getting ahold of weapons of mass destruction. At the same time, we should recognize that terrorism is neither the only threat nor the most serious threat the U.S. faces.²⁹ With the sole exception of 2001, terrorist groups worldwide have never succeeded in killing

²⁹ http://www.foreignpolicy.com/articles/2013/03/04/fp_survey_future_of_war

more than a handful of Americans citizens in any given year. According to the State Department, seventeen American citizens were killed by terrorists in 2011, for instance. The terrorist death toll was fifteen in 2010 and nine in 2009.³⁰

These deaths are tragedies, and we should continue to strive to prevent such deaths—but we should also keep the numbers in perspective. On average, about 55 Americans are killed by lightning strikes each year,³¹ and ordinary criminal homicide claims about 16,000 U.S. victims each year.³² No one, however, believes we need to give the executive branch extraordinary legal authorities to keep Americans from venturing out in electrical storms, or use armed drones to preemptively kill homicide suspects.

What's more, we should keep in mind that military force is not the only tool in the U.S. arsenal against terrorism.³³ Since 9/11, we've gotten far more effective at tracking terrorist activity, disrupting terrorist communications and financing, catching terrorists and convicting them in civilian courts,³⁴ and a wide range of other counterterrorism measures. Much of the time, these non-lethal approaches to counterterrorism are as effective as targeted killings. And in fact, there's growing reason to fear that the expansion of U.S. drone strikes is strategically counterproductive.

Former vice-chair of the Joint Chiefs of Staff General James Cartwright recently expressed concern that as a result of U.S. drone strikes, the U.S. may have “ceded some of our moral high ground.”³⁵ Retired General Stanley McChrystal has expressed similar concerns: “The resentment created by American use of unmanned strikes... is much greater than the average American appreciates. They are hated on a visceral level, even by people who've never seen one or seen the effects of one,” and fuel “a perception of American arrogance.”³⁶ Former Director of National Intelligence Dennis Blair agrees: the U.S. needs to “pull back on unilateral actions... except in extraordinary circumstances,” Blair told CBS news in January. U.S. drone strikes are “alienating the countries concerned [and] ...threatening the prospects for long-term reform raised by the Arab Spring.... [U.S. drone strategy has us] walking out on a thinner and thinner ledge and if even we get to the far extent of it, we are not going to lower the fundamental threat to the U.S. any lower than we have it now.”³⁷

Mr. Chairman, Senator Inhofe, I believe it is past time for a serious overhaul of U.S. counterterrorism strategy. This needs to include a rigorous cost-benefit analysis of U.S. drone strikes, one that takes into account issues both of domestic legality and international legitimacy, and evaluates the impact of targeted killings on regional stability, terrorist recruiting, extremist sentiment, and the future behavior of powerful states such as Russia and China. If we undertake such a rigorous cost-benefit analysis, I suspect we may come to see scaling back on kinetic counterterrorism activities less as an inconvenience than as a strategic necessity—and we may

³⁰ <http://www.state.gov/j/ct/rls/cru/2011/index.htm>

³¹ <http://usatoday30.usatoday.com/weather/news/story/2012-01-09/lightning-deaths-storms-weather/52504754/1>

³² http://www.cdc.gov/nchs/data/nvsr/nvsr61/nvsr61_06.pdf

³³ http://www.whitehouse.gov/sites/default/files/counterterrorism_strategy.pdf

³⁴ <http://www.justice.gov/cjs/>

³⁵ <http://m.npr.org/news/Politics/178753575?textSize=small>

³⁶ <http://www.telegraph.co.uk/news/worldnews/asia/pakistan/9787912/Stanley-McChrystal-criticises-reliance-on-drones-as-strikes-hit-Pakistan.html>

³⁷ <http://www.politico.com/news/stories/0711/60199.html#ixzz2NUC4UwYa>

come to a new appreciation of counterterrorism measures that don't involve missiles raining from the sky.

This *doesn't* mean we should never use military force against terrorists. In some circumstances, military force will be justifiable and useful. But it *does* mean we should rediscover a long-standing American tradition: reserving the use of exceptional legal authorities for rare and exceptional circumstances.

Thank you for the opportunity to testify today.

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TO MAY 16, 2012 STATEMENT FOR THE RECORD SUBMITTED TO THE SENATE COMMITTEE ON ARMED SERVICES BY ROSA BROOKS

The Constitutional and Counterterrorism Implications of Targeted Killing
Testimony Before the Senate Judiciary Subcommittee on the
Constitution, Civil Rights, and Human Rights

April 23, 2013

Statement for the Record Submitted By
Rosa Brooks

Professor of Law, Georgetown University Law Center
Bernard L. Schwartz Senior Fellow, New America Foundation

Chairman Durbin, Ranking Member Cruz, members and staff of the subcommittee, thank you for giving me the opportunity to testify today about the constitutional and counterterrorism implications of U.S. drone wars and targeted killing policy. I appreciate your commitment to fostering a rigorous and transparent dialogue on this tough issue.

I am currently a Professor of Law at Georgetown University Law Center, where I teach courses on international law, constitutional law and national security issues. I am also a Bernard L. Schwartz Senior Fellow at the New America Foundation, and I write a weekly column for *Foreign Policy* magazine. From April 2009 to July 2011, during a public service leave of absence from Georgetown, I had the privilege of serving as Counselor to the Undersecretary of Defense for Policy at the Department of Defense. This testimony reflects my personal views only, however.

Mr. Chairman, the mere mention of drones tends to arouse strong emotional reactions on both sides of the political spectrum, and last week's tragic events in Boston have raised the temperature still further. Some demonize drones, denouncing them for causing civilian deaths or enabling long-distance, "video game-like" killing, even as they ignore the fact that the same (or worse) could equally be said of many other weapons delivery systems. Others glorify drones, viewing them as a low- or no-cost way to "take out terrorists" wherever they may be found, with little regard for broader questions of strategy or the rule of law.

I believe it is important to take a closer look both at what is and what *isn't* new and noteworthy about drone technologies and the activities they enable. Ultimately, "drones" *as such* present us with few new issues—but the manner in which the United States has been using drone strikes raises serious questions about their strategic efficacy and unintended consequences. Just as troubling -- particularly with regard to this subcommittee's mandate -- the legal theories used by the Obama Administration to justify many U.S. drone strikes risk undermining the rule of law.

It does not have to be this way, however. I believe that the president and Congress can and should take action to place U.S. targeted killing policy on firmer legal ground, and at the end of this testimony I will offer some suggestions for how this might be accomplished.

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In the first part of this testimony, I will first address some of the most common but *unfounded* criticisms of U.S. drone strikes. In the second section, I will discuss some of the perceived *advantages* of drones, focusing on the ways in which drone technologies lower the cost of using lethal force across borders. In the third section, I will highlight some of the strategic costs of current U.S. drone policy. In the fourth section, I will first discuss the concept of the rule of law and the legal framework in which U.S. drone strikes occur, then look specifically at the law of armed conflict and finally at the international law of self-defense, highlighting the ways in which existing legal frameworks offer only ambiguous guidance with regard to the legality of U.S. targeted killings. In the fifth section, I will briefly address the question of what precedent U.S. targeted killing policy is setting for other nations. In the sixth and final section, I will turn to the question of reform. While it is beyond the scope of this testimony to fully examine the many possible routes to improving oversight and accountability, I will briefly highlight a number of possible ways for Congress to ensure that U.S. targeted killing policy does not undermine rule of law norms.

1. What's *not* wrong with drones

Many of the most frequently heard criticisms of drones and drone warfare do not hold up well under serious scrutiny – or, at any rate, there's nothing uniquely different or worse about drones, compared to other military technologies. Consider the most common anti-drone arguments.

First, critics often assert that U.S. drone strikes are morally wrong because the kill innocent civilians. This is undoubtedly both true and tragic -- but it is not really an argument against drone strikes as such. *War* kills innocent civilians, period. But the best available evidence suggests that U.S. drone strikes kill civilians at no higher a rate, and almost certainly at a lower rate, than most other common means of warfare.

Much of the time, the use of drones actually permits far greater precision in targeting than most traditional manned aircraft. Today's unmanned aerial vehicles (UAVs) can carry very small bombs that do less widespread damage, and UAVs have no human pilot whose fatigue might limit flight time. Their low profile and relative fuel efficiency combines with this to permit them to spend more time on target than any manned aircraft. Equipped with imaging technologies that enable operators even thousands of miles away to see details as fine as individual faces, modern drone technologies allow their operators to distinguish between civilians and combatants far *more* effectively than most other weapons systems.

That does not mean civilians never get killed in drone strikes. Inevitably, they do, although the covert nature of most U.S. strikes and the contested environment in which they occur makes it impossible to get precise data on civilian deaths. This lack of transparency inevitably fuels rumors and misinformation. However, several credible organizations have sought to track and analyze deaths due to U.S. drone strikes. The British Bureau of Investigative Journalism analyzed examined reports by "government, military and intelligence officials, and by credible media, academic and other sources," for instance, and came up with a range,

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suggesting that the 344 known drone strikes in Pakistan between 2004 and 2012 killed between 2,562 and 3,325 people, of whom between 474 and 881 were likely civilians.³⁸ (The numbers for Yemen and Somalia are more difficult to obtain.) The New America Foundation, with which I am affiliated, came up with slightly lower numbers, estimating that U.S. drone strikes killed somewhere between 1,873 and 3,171 people overall in Pakistan, of whom between 282 and 459 were civilians.³⁹

Whether drones strikes cause "a lot" or "relatively few" civilian casualties depends what we regard as the right point of comparison. Should we compare the civilian deaths caused by drone strikes to the civilian deaths caused by large-scale armed conflicts? One study by the International Committee for the Red Cross found that on average, 10 civilians died for every combatant killed during the armed conflicts of the 20th century.⁴⁰ For the Iraq War, estimates vary widely; different studies place the ratio of civilian deaths to combatant deaths anywhere between 10 to 1 and 2 to 1.⁴¹

The most meaningful point of comparison for drones is probably manned aircraft. It's extraordinarily difficult to get solid numbers here, but one analysis published in the *Small Wars Journal* suggested that in 2007 the ratio of civilian to combatant deaths due to coalition air attacks in Afghanistan may have been as high as 15 to 1.⁴² More recent UN figures suggest a far lower rate, with as few as one civilian killed for every ten airstrikes in Afghanistan.⁴³ But drone strikes have also gotten far less lethal for civilians in the last few years: the New America Foundation concludes that only three to nine civilians were killed during 72 U.S. drone strikes in Pakistan in 2011, and the 2012 numbers were also low.⁴⁴ In part, this is due to technological advances over the last decade, but it's also due to far more stringent rules for when drones can release weapons.

Few details are known about the precise targeting procedures followed by either U.S. armed forces or the Central Intelligence Agency with regard to drone strikes. The Obama Administration is reportedly finalizing a targeted killing "playbook,"⁴⁵ outlining in great detail the procedures and substantive criteria to be applied. I believe an unclassified version of this should be made public, as it may help to diminish concerns reckless or negligent targeting decisions. Even in the absence of specific details, however, I believe we can have confidence in the commitment of both military and intelligence personnel to avoiding civilian casualties to the greatest extent possible. The Obama Administration has stated that it regards both the military and the CIA as bound by the law of war when force is used for the purpose of

³⁸ See <http://www.thebureauinvestigates.com/category/projects/drones/>

³⁹ <http://counterterrorism.newamerica.net/drones>

⁴⁰ See http://www.nytimes.com/2010/10/23/world/middleeast/23casualties.html?_r=3; www.icrc.org/eng/assets/files/other/irrc-872-wenger-mason.pdf

⁴¹ See http://en.wikipedia.org/wiki/Casualties_of_the_Iraq_War

⁴² See <http://smallwarsjournal.com/jml/art/close-air-support-and-civilian-casualties-in-afghanistan>

⁴³ See <http://www.navytimes.com/article/20130219/NEWS/302190304/U-N-Afghan-civilian-deaths-in-airstrikes-down;>

<http://unama.unmissions.org/Default.aspx?tabid=12254&ctl=Details&mid=15756&ItemID=36445&language=en-U.S.>

⁴⁴ See <http://counterterrorism.newamerica.net/drones>

⁴⁵ See http://articles.washingtonpost.com/2012-10-24/world/35499428_1_drone-strikes-brennan-obama-administration;
<http://www.usnews.com/debate-club/has-obama-gone-too-far-with-his-drone-policies/brennan-and-obamas-drone-playbook-must-be-debated-publicly>

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targeted killing.⁴⁶ (I will discuss the applicable law of war principles in section IV of this statement). What is more, the military is bound by the Uniform Code of Military Justice.

Concern about civilian casualties is appropriate, and our targeting decisions, however thoughtfully made, are only as good as our intelligence—and only as wise as our overall strategy. Nevertheless, there is no evidence supporting the view that drone strikes cause disproportionate civilian casualties relative to other commonly used means or methods of warfare. On the contrary, the evidence suggests that if the number of civilian casualties is our metric, drone strikes do a better job of discriminating between civilians and combatants than close air support or other tactics that receive less attention.

Critics of U.S. drone policy also decry the fact that drones enable U.S. personnel to kill from a safe distance, which seems to be viewed as somehow “unsavory.” But long-distance killing is neither something to automatically condemn nor something unique to drone technologies. Military commanders naturally seek ways to kill enemies without risking the lives of our own troops – and if drone technologies enable us to reduce the danger to our own personnel, all things being equal this is surely a good thing, not a bad thing. No one would argue that we should strip troops of body armor just to level the playing field.

It is also important to consider drone strikes in the context of the evolution of warfare. After all, drones are hardly the only technology that has facilitated killing from a distance. In this sense, drones don't present any “new” issues not already presented by aerial bombing -- or by guns or bows and arrows, for that matter. The crossbow and later the long bow were considered immoral in their day. In 1139, the Second Lateran Council of Pope Innocent II is said to have “prohibit[ed] under anathema that murderous art of crossbowmen and archers, which is hateful to God.”⁴⁷ In the early 1600s, Cervantes took a similar view of artillery, which he called a “devilish invention” allowing “a base cowardly hand to take the life of the bravest gentleman,” with bullets coming –like drones-- “nobody knows how or from whence.”⁴⁸

Other critics have decried what they called “the PlayStation mentality” created by drone technologies. I cannot see, however, that drones any more “video game-like” than, say, having cameras in the noses of cruise missiles. Regardless, there's little evidence that drone technologies “reduce” their operators' awareness of human suffering. If anything, drone operators may be far more keenly aware of the suffering they help inflict than any sniper or bomber pilot could be, precisely because the technology enables such clear visual monitoring. Increasingly, there is evidence that drone pilots, just like combat troops, can suffer from post-traumatic stress disorder. A recent Air Force study found that 29 percent of drone pilots suffered from “burnout,” with 17 percent “clinically distressed.”⁴⁹

⁴⁶ See http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf

⁴⁷ See <http://www.ewtn.com/library/COUNCILS/LATERAN2.HTM>

⁴⁸ See JFC Fuller, *Armament and History: The Influence of Armament on History from the Dawn of Classical Warfare to the End of the Second World War*, 1998, at <http://books.google.com/books?id=hECRavhisUIC&pg=PA91&lpg=PA91&dq=cervantes+artillery+base+devilish&source=bl&ots=ZlFDfmgJuh&sig=2E4lVzuBqOREKoVokbnfUpRG3fs&hl=en> “\v=onepage&q=cervantes%20artillery%20base%20devilish&f=false”

⁴⁹ See <http://www.npr.org/2011/12/19/143926857/report-high-levels-of-burnout-in-u-s-drone-pilots>

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2. The perceived advantages of drone strikes

For every critic who demonizes drones while ignoring their similarities to other less-demonized technologies, there are as many others who seem to regard drones as a near-panacea – an almost magical new technology that will allow us to economically stave off foreign threats from the comfort and safety of home – or even, perhaps, find some new “fix” to the thorny problems posed by “homegrown” attacks such as those on the Boston Marathon.

But the advantages of drones are as overstated and misunderstood as the problems they pose—and in some ways, their very perceived advantages cause new problems. Drone technologies temptingly lower or disguise the costs of lethal force, but their availability can blind us to the potentially dangerous longer-term costs and consequences of our strategic choices.

Armed drones lower the perceived costs of using lethal force in at least three ways. First, drones reduce the dollar cost of using lethal force inside foreign countries.⁵⁰ Most drones are economical compared with the available alternatives.⁵¹ Manned aircraft, for instance, are quite expensive:⁵² Lockheed Martin's F-22 fighter jets cost about \$150 million each; F-35s are \$90 million; and F-16s are \$55 million. But the 2011 price of a Reaper drone was approximately \$28.4 million, while Predator drones cost only about \$5 million to make.⁵³ As with so many things, putting a dollar figure on drones is difficult; it depends what costs are counted, and what time frame is used. Nevertheless, drones continue to be *perceived* as cheaper by government decision-makers.

Second, relying on drone strikes rather than alternative means reduces the domestic political costs of using lethal force. Sending manned aircraft or special operations forces after a suspected terrorist places the lives of U.S. personnel at risk, and full-scale invasions and occupations endanger even more American lives. In contrast, using armed drones eliminates all short-term risks to the lives of U.S. personnel involved in the operations.

Third, by reducing accidental civilian casualties,⁵⁴ precision drone technologies reduce the perceived moral and reputational costs of using lethal force. The U.S. government is extraordinarily concerned about avoiding unnecessary civilian casualties, and rightly so. There are moral and legal reasons for this concern, and there are also pragmatic reasons: civilian casualties cause pain and resentment within local populations and host-country governments and alienate the international community.

⁵⁰ See https://www.deloitte.com/assets/Dcom-Australia/Local%20Assets/Documents/Industries/Government%20Services/Public%20Sector/Deloitte_DefenseUAV_DI_CaseStudy_2Apr2012.pdf

⁵¹ See <http://www.economist.com/node/14299496>

⁵² See <http://fpc.state.gov/documents/organization/180677.pdf>

⁵³ See <http://www.nationaldefensemagazine.org/archive/2012/February/Pages/AirForceF-35s,DronesMaySquareOffinBudgetBattle.aspx>

⁵⁴ See <http://www.nytimes.com/2012/07/15/sunday-review/the-moral-case-for-drones.html>

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It is of course not a bad thing to possess military technologies that are cost little, protect American lives and enable us to minimize civilian casualties. When new technologies appear to reduce the costs of using lethal force, however, the threshold for deciding to use lethal force correspondingly drops, and officials will be tempted to use lethal force with greater frequency and less wisdom.

Over the last decade, we have seen U.S. drone strikes evolve from a tool used in extremely limited circumstances to go after specifically identified high-ranking al Qaeda officials to a tool relied on in an increasing number of countries to go after an eternally lengthening list of putative bad actors, with increasingly tenuous links to grave or imminent threats to the United States. Some of these suspected terrorists have been identified by name and specifically targeted, while others are increasingly targeted on the basis of suspicious behavior patterns.

Increasingly, drones strikes have targeted militants who are lower and lower down the terrorist food chain,⁵⁵ rather than terrorist masterminds.⁵⁶ Although drone strikes are believed to have killed more than 3,000 people since 2004,⁵⁷ analysis by the New America Foundation and more recently by a the McClatchy newspapers suggests that only a small fraction of the dead appear to have been so-called "high-value targets."⁵⁸ What's more, drone strikes have spread ever further from "hot" battlefields, migrating from Pakistan to Yemen to Somalia (and perhaps to Mali⁵⁹ and the Philippines as well).⁶⁰

This increasing use of drone strikes to go after individuals with more and more tenuous links to Al Qaeda and the 9/11 attacks pushes the furthest boundaries of Congress' 2011 Authorization for use of Military Force. The AUMF authorized the president to "[U]se all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the 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."

The AUMF's language appears to restrict the use of force both with regard to who can be targeted (those with some culpability for the 9/11 attacks) and with regard to the purpose for which force is used (to prevent future attacks against the U.S.). As drone strikes expand beyond Al Qaeda targets (to go after, for instance, suspected members of Somalia's al Shabaab), it grows increasingly difficult to justify such strikes under the AUMF. Do we believe al Shabaab was in any way culpable for the 9/11 attacks? Do we believe al Shabaab, an organization with primarily local and regional ambitions, has the desire or capability to engage in acts of international terrorism against the United States?

⁵⁵ See http://articles.cnn.com/2012-09-05/opinion/opinion_bergen-obama-drone_1_drone-strikes-drone-attacks-drone-program

⁵⁶ See <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/20/AR2011022002975.html>

⁵⁷ See <http://counterterrorism.newamerica.net/drones>

⁵⁸ See <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/20/AR2011022002975.html>

⁵⁹ See http://www.longwarjournal.org/threat-matrix/archives/2012/06/did_the_us_launch_a_drone_stri.php

⁶⁰ See <http://www.brookings.edu/research/opinions/2012/03/05-drones-philippines-ahmed>

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3. The true costs of current US drone policy

When we come to rely excessively on drone strikes as a counterterrorism tool, this has potential costs of its own. Drones strikes enable a "short-term fix" approach to counterterrorism, one that relies excessively on eliminating specific individuals deemed to be a threat, without much discussion of whether this strategy is likely to produce long-term security gains.

Most counter-terrorism experts agree that in the long-term, terrorist organizations are rarely defeated militarily. Instead, terrorist groups fade away when they lose the support of the populations within which they work. They die out when their ideological underpinnings come undone – when new recruits stop appearing—when the communities in which they work stop providing active or passive forms of assistance—when local leaders speak out against them and residents report their activities and identities to the authorities.

A comprehensive counterterrorist strategy recognizes this, and therefore relies heavily on activities intended to undermine terrorist credibility within populations, as well as on activities designed to disrupt terrorist communications and financing. Much of the time, these are the traditional tools of intelligence and law enforcement. Kinetic force undeniably has a role to play in counterterrorism in certain circumstances, but it is rarely a magic bullet.

In addition, overreliance on kinetic tools at the expense of other approaches can be dangerous. Drone strikes -- lawful or not, justifiable or not -- can have the unintended consequence of increasing both regional instability and anti-American sentiment. Drone strikes sow fear among the "guilty" and the innocent alike,⁶¹ and the use of drones in Pakistan and Yemen has increasingly been met with both popular and diplomatic protests. Indeed, drone strikes are increasingly causing dismay and concern within the U.S. population.

As the Obama administration increases its reliance on drone strikes as the counterterrorism tool of choice, it is hard not to wonder whether we have begun to trade tactical gains for strategic losses. What impact will U.S. drone strikes ultimately have on the stability of Pakistan, Yemen, or Somalia?⁶² To what degree -- especially as we reach further and further down the terrorist food chain, killing small fish who may be motivated less by ideology than economic desperation -- are we actually creating new grievances within the local population -- or even within diaspora populations here in the United States?⁶³ As Defense Secretary Donald Rumsfeld asked during the Iraq war, are we creating terrorists faster than we kill them?⁶⁴

At the moment, there is little evidence that U.S. drone policy -- or individual drone strikes--result from a comprehensive assessment of strategic costs and benefits, as opposed to a shortsighted determination to strike targets of opportunity, regardless of long-term impact. As a military acquaintance of mine memorably put it, drone strikes remain "a tactic in search of a strategy."

⁶¹ See <http://www.economist.com/node/21561927>

⁶² See <http://www.guardian.co.uk/world/2012/jun/05/al-qaida-drone-attacks-too-broad>

⁶³ See http://www.washingtonpost.com/world/middle_east/in-yemen-us-airstrikes-breed-anger-and-sympathy-for-al-qaeda/2012/05/29/gJQAUmK10U_story.html

⁶⁴ See <http://www.usatoday.com/news/washington/executive/rumsfeld-memo.htm>

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4. Drones and the rule of law

Mr. Chairman, I would like to turn now to the legal framework applicable to U.S. drone strikes. Both the United States and the international community have long had rules governing armed conflicts and the use of force in national self-defense. These rules apply whether the lethal force at issue involves knives, handguns, grenades or weaponized drones. When drone technologies are used in traditional armed conflicts—on “hot battlefields” such as those in Afghanistan, Iraq or Libya, for instance – they pose no new legal issues. As Administration officials have stated, their use is subject to the same requirements as the use of other lawful means and methods of warfare.⁶⁵

But if drones used in traditional armed conflicts or traditional self-defense situations present no “new” legal issues, some of the activities and policies *enabled and facilitated* by drone technologies pose significant challenges to existing legal frameworks.

As I have discussed above, the availability of perceived low cost of drone technologies makes it far easier for the U.S. to “expand the battlefield,” striking targets in places where it would be too dangerous or too politically controversial to send troops. Specifically, drone technologies enable the United States to strike targets deep inside foreign states, and do so quickly, efficiently and deniably. As a result, drones have become the tool of choice for so-called “targeted killing” – the deliberate targeting of an individual or group of individuals, whether known by name or targeted based on patterns of activity, inside the borders of a foreign country. It is when drones are used in targeted killings outside of traditional or “hot” battlefields that their use challenges existing legal frameworks.

Law is almost always out of date: we make legal rules based on existing conditions and technologies, perhaps with a small nod in the direction of predicted future changes. As societies and technologies change, law increasingly becomes an exercise in jamming square pegs into round holes. Eventually, that process begins to do damage to existing law: it gets stretched out of shape, or broken. Right now, I would argue, U.S. drone policy is on the verge of doing significant damage to the rule of law.

A. The Rule of Law

At root, the idea of “rule of law” is fairly simple, and well understood by Americans familiar with the foundational documents that established our nation, such as the Declaration of

⁶⁵ See http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf; Harold H. Koh, Keynote Address at the Annual Meeting of the American Society of International Law, Washington, DC (Mar. 25, 2010), Eric Holder, Address at Northwestern University School of Law, Chicago, IL (Mar. 5, 2011), <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>; <http://www.state.gov/s/l/releases/remarks/139119.htm>; John O. Brennan, Address at Program on Law and Security, Harvard Law School, Cambridge, MA: Strengthening our Security by Adhering to our Values and Laws (Sep. 16, 2011), <http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an>; John O. Brennan, Address at Woodrow Wilson International Center for Scholars, Washington, DC: The Ethics and Efficacy of the president’s Counterterrorism Strategy (Apr. 30, 2012), <http://www.wilsoncenter.org/event/the-ethics-and-ethics-us-counterterrorism-strategy>.

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Independence, the Constitution and the Bill of Rights. The rule of law requires that governments follow transparent, clearly defined and universally applicable laws and procedures. The goal of the rule of law is to ensure predictability and stability, and to prevent the arbitrary exercise of power. In a society committed to the rule of law, the government cannot fine you, lock you up, or kill you on a whim -- it can restrict your liberty or take your property or life only in accordance with pre-established processes and rules that reflect basic notions of justice, humanity and fairness.

Precisely what constitutes a fair process is debatable, but most would agree that at a minimum, fairness requires that individuals have reasonable notice of what constitutes the applicable law, reasonable notice that they are suspected of violating the law, a reasonable opportunity to rebut any allegations against them, and a reasonable opportunity to have the outcome of any procedures or actions against them reviewed by some objective person or body. These core values are enshrined both in the U.S. Constitution and in international human rights law instruments such as the International Covenant on Civil and Political Rights, to which the United States is a party.

In ordinary circumstances, this bundle of universally acknowledged rights (together with international law principles of sovereignty) means it is clearly unlawful for one state to target and kill an individual inside the borders of another state. Recall, for instance, the 1976 killing of Chilean dissident Orlando Letelier in Washington DC. When Chilean government intelligence operatives planted a car bomb in the car used by Letelier, killing him and a U.S. citizen accompanying him, the United States government called this an act of murder—an unlawful political assassination.

B. Targeted Killing and the Law of Armed Conflict

Of course, sometimes the “ordinary” legal rules do not apply. In war, the willful killing of human beings is permitted, whether the means of killing is a gun, a bomb, or a long-distance drone strike. The law of armed conflict permits a wide range of behaviors that would be unlawful in the absence of an armed conflict. Generally speaking, the intentional destruction of private property and severe restrictions on individual liberties are impermissible in peacetime, but acceptable in wartime, for instance. Even actions that a combatant knows will cause civilian deaths are lawful when consistent with the principles of necessity, humanity, proportionality,⁶⁶ and distinction.⁶⁷

It is worth briefly explaining these principles. The principle of necessity requires parties to a conflict to limit their actions to those that are indispensable for securing the complete submission of the enemy as soon as possible (and that are otherwise permitted by international law). The principle of humanity forbids parties to a conflict to inflict gratuitous violence or employ methods calculated to cause unnecessary suffering. The principle of proportionality requires parties to ensure that the anticipated loss of life or property incidental to an attack is not

⁶⁶ See generally the U.S. Army’s Operational Law Handbook, 2012, at http://www.loc.gov/tr/frd/Military_Law/pdf/operational-law-handbook_2012.pdf; http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter4_rule14

⁶⁷ See generally the U.S. Army’s Operational Law Handbook, 2012, at http://www.loc.gov/tr/frd/Military_Law/pdf/operational-law-handbook_2012.pdf; http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule1

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excessive in relation to the concrete and direct military advantage expected to be gained. Finally, the principle of discrimination or distinction requires that parties to a conflict direct their actions only against combatants and military objectives, and take appropriate steps to distinguish between combatants and non-combatants.⁶⁸

This is a radical oversimplification of a very complex body of law.⁶⁹ But as with the rule of law, the basic idea is pretty simple. When there is no war -- when ordinary, peacetime law applies -- agents of the state aren't supposed to lock people up, take their property or kill them, unless they have jumped through a whole lot of legal hoops first. When there is an armed conflict, however, everything changes. War is not a legal free-for-all⁷⁰ -- torture, rape are always crimes under the law of war, as is killing that is willful, wanton and not justified by military necessity⁷¹ -- but there are far fewer constraints on state behavior.

Technically, the law of war is referred to using the Latin term "*lex specialis*" -- special law. It is applicable in—and *only* in -- special circumstances (in this case, armed conflict), and in those special circumstances, it supersedes "ordinary law," or "*lex generalis*," the "general law" that prevails in peacetime. We have one set of laws for "normal" situations, and another, more flexible set of laws for "extraordinary" situations, such as armed conflicts.

None of this poses any inherent problem for the rule of law. Having one body of rules that tightly restricts the use of force and another body of rules that is far more permissive does not fundamentally undermine the rule of law, as long as we have a reasonable degree of consensus on what circumstances trigger the "special" law, and as long as the "special law" doesn't end up undermining the general law.

To put it a little differently, war, with its very different rules, does not challenge ordinary law as long as war is the exception, not the norm -- as long as we can all agree on what constitutes a war -- as long as we can tell when the war begins and ends -- and as long as we all know how to tell the difference between a combatant and a civilian, and between places where there's war and places where there's no war.

Let me return now to the question of drones and targeted killings. When all these distinctions I just mentioned are clear, the use of drones in targeted killings does not necessarily present any great or novel problem. In Libya, for instance, a state of armed conflict clearly existed inside the borders of Libya between Libyan government forces and NATO states. In that context, the use of drones to strike Libyan military targets is no more controversial than the use of manned aircraft.

That is because our core rule of law concerns have mostly been satisfied: we know there is an armed conflict, in part because all parties to it agree that there is an armed conflict, in part because observers (such as international journalists) can easily verify the presence of uniformed

⁶⁸ See generally the U.S. Army's Operational Law Handbook, 2012, at http://www.loc.gov/rr/frd/Military_Law/pdf/operational-law-handbook_2012.pdf

⁶⁹ See <http://ihl.ihlresearch.org/index.cfm?fuseaction=page.viewpage&pageid=2083>

⁷⁰ See <http://www.law.cornell.edu/uscode/text/18/2441>

⁷¹ See <http://www1.umn.edu/humanrts/instree/icelementssofcrimes.html>

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military personnel engaged in using force, and in part because the violence is, from an objective perspective, widespread and sustained: it is not a mere skirmish or riot or criminal law enforcement situation that got out of control. We know *who* the “enemy” is: Libyan government forces. We know *where* the conflict is and is not: the conflict was in Libya, but not in neighboring Algeria or Egypt. We know *when* the conflict began, we know who authorized the use of force (the UN Security Council) and, just as crucially, we know whom to hold *accountable* in the event of error or abuse (the various governments involved).⁷²

Once you take targeted killings outside hot battlefields, it’s a different story. The Obama Administration is currently using drones to strike terror suspects in Pakistan, Somalia, Yemen, and—perhaps—Mali and the Philippines as well. Defenders of the administration’s increasing reliance on drone strikes in such places assert that the U.S. is in an armed conflict with “al Qaeda and its associates,” and on that basis, they assert that the law of war is applicable -- in any place and at any time -- with regard to any person the administration deems a combatant.

The trouble is, no one outside a very small group within the U.S. executive branch has any ability to evaluate who is and who isn’t a combatant. The war against al Qaeda and its associates is not like World War II, or Libya, or even Afghanistan: it is an open-ended conflict with an inchoate, undefined adversary (who exactly are al Qaeda’s “associates”?). What is more, targeting decisions in this nebulous “war” are based largely on classified intelligence reporting. As a result, Administration assertions about who is a combatant and what constitutes a threat are entirely non-falsifiable, because they’re based wholly on undisclosed evidence. Add to this still another problem: most of these strikes are considered covert action, so although the U.S. sometimes takes public credit for the deaths of alleged terrorist leaders, most of the time, the U.S. will not even officially acknowledge targeted killings.

This leaves all the key rule-of-law questions related to the ongoing war against al Qaeda and its “associates” unanswered.⁷³ Based on what criteria might someone be considered a combatant or directly participating in hostilities? What constitutes “hostilities” in the context of an armed conflict against a non-state actor, and what does it mean to participate in them? And just where is the war? Does the war (and thus the law of war) somehow “travel” with combatants? Does the U.S. have a “right” to target enemy combatants anywhere on earth, or does it depend on the consent of the state at issue? Who in the United States government is authorized to make such determinations, and what is the precise chain of command for such decisions?

I think the rule of law problem here is obvious: when “armed conflict” becomes a term flexible enough to be applied both to World War II and to the relations between the United States and “associates” of al Qaeda such as Somalia’s al Shabaab, the concept of armed conflict is not very useful anymore. And when we lack clarity and consensus on how to recognize “armed conflict,” we no longer have a clear or principled basis for deciding how to categorize U.S. targeted killings. Are they, as the U.S. government argues, legal under the laws of war? Or are they, as some human rights groups have argued, unlawful murder?

⁷² In my previous scholarly work, I have written extensively about the challenges posed by geographically dispersed terrorist organizations to traditional legal categories. See, e.g., Rosa Brooks, *War Everywhere: Rights, National Security Law, And The Law Of Armed Conflict In The Age Of Terror*, 153 U. Pa. L. Rev. 675 (2004).

⁷³ See <http://www.hrw.org/news/2011/12/19/q-us-targeted-killings-and-international-law>

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C. Targeted Killing and the International Law of Self-Defense

When faced with criticisms of the law of war framework as a justification for targeted killing, Obama Administration representatives often shift tack, arguing that international law rules on national self-defense provide an alternative or additional legal justification for U.S. targeted killings. Here, the argument is that if a person located in a foreign state poses an "imminent threat of violent attack" against the United States, the U.S. can lawfully use force in self-defense, provided that the defensive force used is otherwise consistent with law of war principles.

Like law of war-based arguments, this general principle is superficially uncontroversial: if someone overseas is about to launch a nuclear weapon at New York City, no one can doubt that the United States has a perfect right (and the president has a constitutional duty) to use force if needed to prevent that attack, regardless of the attacker's nationality.

But once again, the devil is in the details. To start with, what constitutes an "imminent" threat? Traditionally, both international law and domestic criminal law understand that term narrowly:⁷⁴ to be "imminent," a threat cannot be distant or speculative.⁷⁵ But much like the Bush Administration before it, the Obama Administration has put forward an interpretation of the word "imminent" that bears little relation to traditional legal concepts.

According to a leaked 2011 Justice Department white paper⁷⁶—the most detailed legal justification that has yet become public-- the requirement of imminence "does not require the United States to have clear evidence that a specific attack on U.S. persons and interests will take place in the immediate future." This seems, in itself, like a substantial departure from accepted international law definitions of imminence.

But the White Paper goes even further, stating that "certain members of al Qaeda are continually plotting attacks...and would engage in such attacks regularly [if] they were able to do so, [and] the U.S. government may not be aware of all... plots as they are developing and thus cannot be confident that none is about to occur." For this reason, it concludes, anyone deemed to be an operational leader of al Qaeda or its "associated forces" presents, by definition, an imminent threat even in the *absence* of any evidence whatsoever relating to immediate or future attack plans. In effect, the concept of "imminent threat" (part of the international law relating to self-defense) becomes conflated with identity or status (a familiar part of the law of armed conflict).

That concept of imminence has been called Orwellian, and although that is an overused epithet, in this context it seems fairly appropriate. According to the Obama Administration,

⁷⁴ The most restrictive traditional formulation of the term imminent in international law can be seen in the famous 1837 Exchange of letters between U.S. Secretary of State Daniel Webster and Lord Ashburton, Foreign Secretary of Great Britain, relating to the case of the SS *Caroline*, explaining "imminent attack" as one that is "instant, overwhelming, leaving no choice of means, and no moment for deliberation." More recent approaches have been somewhat more flexible. See, e.g., United Nations Secretary-General's High-level Panel on Threats, Challenges and Change: "A More Secure World: Our Shared Responsibility," at <http://www.un.org/secureworld/>

⁷⁵ See <http://opiniojuris.org/2012/03/07/why-preventive-self-defense-violates-the-un-charter/>

⁷⁶ See http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf

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“imminent” no longer means “immediate,” and in fact the very *absence* of clear evidence indicating specific present or future attack plans becomes, paradoxically, the basis for assuming that attack may *perpetually* be “imminent.”

The 2011 Justice Department White Paper notes that the use of force in self-defense must comply with general law of war principles of necessity, proportionality, humanity, and distinction. The White Paper offers no guidance on the specific criteria for determining when an individual is a combatant (or a civilian participating directly in hostilities), however. It also offers no guidance on how to determine if a use of force is necessary or proportionate.

From a traditional international law perspective, this necessity and proportionality inquiry relates both to imminence and to the gravity of the threat itself, but so far there has been no public Administration statement as to how the administration interprets these requirements. Is *any* threat of “violent attack” sufficient to justify killing someone in a foreign country, including a U.S. citizen? Is *every* potential suicide bomber targetable, or does it depend on the gravity of the threat? Are we justified in drone strikes against targets who might, if they get a chance at some unspecified future point, place an IED that might, if successful, kill one person? Ten people? Twenty? 2,000? How grave a threat must there be to justify the use of lethal force against an American citizen abroad -- or against non-citizens, for that matter?

As I have noted, it is impossible for outsiders to fully evaluate U.S. drone strikes, since so much vital information remains classified. In most cases, we know little about the identities; activities or future plans of those targeted. Nevertheless, given the increased frequency of U.S. targeted killings in recent years, it seems reasonable to wonder whether the Administration conducts a rigorous necessity or proportionality analysis in all cases.

So far, the leaked 2011 Justice Department White Paper represents the most detailed legal analysis of targeted killings available to the public. It is worth noting, incidentally, that this White Paper addresses only the question of whether and when it is lawful for the U.S. government to target U.S. citizens abroad. We do not know what legal standards the Administration believes apply to the targeting of non-citizens. It seems reasonable to assume, however, that the standards applicable to non-citizens are less exacting than those the Administration views as applicable to citizens.

Defenders of administration targeted killing policy acknowledge that the criteria for determining how to answer these many questions have not been made public, but insist that this should not be cause for concern. The Administration has reportedly developed a detailed “playbook” outlining the targeting criteria and procedures,⁷⁷ and insiders insist that executive branch officials go through an elaborate process in which they carefully consider every possible issue before determining that a drone strike is lawful.⁷⁸

No doubt they do, but this is somewhat cold comfort. Formal processes tend to further normalize once-exceptional activities -- and “trust us” is a rather shaky foundation for the rule of

⁷⁷ See <http://www.uta.edu/faculty/story/2311/Misc/2013.4.1.DronesTargetedKillingWhoCanWeKill.pdf>.

⁷⁸ See <http://www.state.gov/s/l/releases/remarks/139119.htm>, <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>, <http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?pagewanted=all>

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law. Indeed, the whole point of the rule of law is that individual lives and freedom should *not* depend solely on the good faith and benevolence of government officials.

As with law of war arguments, stating that U.S. targeted killings are clearly legal under traditional self-defense principles requires some significant cognitive dissonance. Law exists to restrain untrammelled power. It is no doubt possible to make a plausible legal argument justifying each and every U.S. drone strike -- but this merely suggests that we are working with a legal framework that has begun to outlive its usefulness.

The real question isn't whether U.S. drone strikes are "legal." The real question is this: Do we really want to live in a world in which the U.S. government's justification for killing is so malleable?

5. Setting Troubling International Precedents

Here is an additional reason to worry about the U.S. overreliance on drone strikes: Other states will follow America's example, and the results are not likely to be pretty. Consider once again the Letelier murder, which was an international scandal in 1976: If the Letelier assassination took place today, the Chilean authorities would presumably insist on their national right to engage in "targeted killings" of individuals deemed to pose imminent threats to Chilean national security -- and they would justify such killings using precisely the same legal theories the U.S. currently uses to justify targeted killings in Yemen or Somalia. We should assume that governments around the world—including those with less than stellar human rights records, such as Russia and China—are taking notice.

Right now, the United States has a decided technological advantage when it comes to armed drones, but that will not last long. We should use this window to advance a robust legal and normative framework that will help protect against abuses by those states whose leaders can rarely be trusted. Unfortunately, we are doing the exact opposite: Instead of articulating norms about transparency and accountability, the United States is effectively handing China, Russia, and every other repressive state a playbook for how to foment instability and --literally -- get away with murder.

Take the issue of sovereignty. Sovereignty has long been a core concept of the Westphalian international legal order.⁷⁹ In the international arena, all sovereign states are formally considered equal and possessed of the right to control their own internal affairs free of interference from other states. That's what we call the principle of non-intervention -- and it means, among other things, that it is generally prohibited for one state to use force inside the borders of another sovereign state. There are some well-established exceptions, but they are few in number. A state can lawfully use force inside another sovereign state with that state's

⁷⁹ See <http://www.towson.edu/polsci/trency/sovereign.htm>

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invitation or consent, or when force is authorized by the U.N. Security Council, pursuant to the U.N. Charter,⁸⁰ or in self-defense "in the event of an armed attack."

The 2011 Justice Department White Paper asserts that targeted killings carried out by the United States don't violate another state's sovereignty as long as that state either consents or is "unwilling or unable to suppress the threat posed by the individual being targeted." That sounds superficially plausible, but since the United States views itself as the sole arbiter of whether a state is "unwilling or unable" to suppress that threat, the logic is in fact circular.

It goes like this: The United States -- using its own malleable definition of "imminent" -- decides that Person X, residing in sovereign State Y, poses a threat to the United States and requires killing. Once the United States decides that Person X can be targeted, the principle of sovereignty presents no barriers, because either 1) State Y will *consent* to the U.S. use of force inside its borders, in which case the use of force presents no sovereignty problems or 2) State Y will *not* consent to the U.S. use of force inside its borders, in which case, by definition, the United States will deem State Y to be "unwilling or unable to suppress the threat" posed by Person X and the use of force again presents no problem.

This is a legal theory that more or less eviscerates traditional notions of sovereignty, and has the potential to significantly destabilize the already shaky collective security regime created by the U.N. Charter.⁸¹ If the U.S. is the sole arbiter of whether and when it can use force inside the borders of another state, any other state strong enough to get away with it is likely to claim similar prerogatives. And, of course, if the U.S. executive branch is the sole arbiter of what constitutes an imminent threat and who constitutes a targetable enemy combatant in an ill-defined war, why shouldn't other states make identical arguments—and use them to justify the killing of dissidents, rivals, or unwanted minorities?

6. Towards solutions: ensuring that US targeted killing policy does not undermine the rule of law.

I have suggested in this testimony that while the law of war and the international law of self-defense *may* provide justification for U.S. targeted killing policy, it is, in practice, difficult to say for sure. This is because decisions about who is a combatant, what threats are imminent and so on are inherently fact specific. Since U.S. targeted killings take place under a cloak of secrecy, it is impossible for outsiders to evaluate the facts or apply the law to specific facts.

I have also suggested that we face a problem that is deeper still: we are attempting to apply old law to novel situations. As I noted earlier, the law of war evolved in response to traditional armed conflicts, and cannot be easily applied to relations between states and geographically diffuse non-state terrorist organizations. When we try to apply the law of war to

⁸⁰ See <http://www.un.org/en/documents/charter/chapter7.shtml>

⁸¹ See generally Rosa Brooks, *Be Careful What You Wish For: Changing Doctrines, Changing Technologies, and the Lower Cost of War*, 106 Am. Soc'y Int'l L. Proc. 106 (2012) and *The Strange Convergence of Sovereignty-Limiting Doctrines in Human Rights and National Security Law Discourses*, Georgetown J. Int'l Affairs, Issue 13-2, 2012.

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modern terrorist threats, we encounter numerous translation problems. Most disturbingly, it becomes nearly impossible to make a principled decision about when the law of war is applicable in the first place, and when it is not.

As I noted earlier, law is almost always out of date: legal rules are made based on the conditions and technologies existing at the time, and as societies and technologies change, law increasingly becomes an exercise in jamming square pegs into round holes. Up to a point, this works, but eventually, that process begins to do damage to existing law: it gets stretched out of shape, or broken. At that point, we need to update our laws and practices before too much damage is done.

This is a daunting project, and I do not have any simple solutions to offer. In a sense, the struggle to adapt old legal frameworks and institutions to radically new situations will be the work of generations. But the complexity of the problem should not be an excuse for ignoring it. In that spirit, I will suggest several potential means to improve on the existing state of affairs and enhance oversight, transparency and accountability. Congress can implement some of these recommendations, while others would require Administration acquiescence. Fully evaluating the pros and cons of potential reforms is beyond the scope of this testimony, but I hope that this will be the subject of future hearings.

1. Congress should encourage Administration transparency and public debate by continuing to hold hearings on targeted killing policy, its relationship to (and impact on) broader U.S. counterterrorism, national security and foreign policy goals, and appropriate mechanisms for improving oversight, accountability and conformity to U.S. rule of law values. Congress should also consider hearings on the longer-term challenge of adapting the law of war and law of self-defense to 21st century threats.
2. Congress should also encourage Administration transparency through the imposition of reporting requirements. Congress could require that the executive branch provide thorough reports on any uses of force not expressly authorized by Congress and/or outside specified regions, and require that such reports contain both classified sections and unclassified sections in which the Administration provides a legal and policy analysis of any use of force in self-defense or other uses of force outside traditional battlefields.
3. Congress should consider repealing the 2001 AUMF. The Obama administration's domestic legal justification for most drone strikes relies on the AUMF, which it interprets to authorize the use of force not only against those individuals and organizations with some real connection to the 9/11 attacks, but also against all "associates" of al Qaeda. This flexible interpretation of the AUMF creates few constraints, and has lowered the threshold for using force. Repealing the AUMF would not deprive the president of the ability to use force if necessary to prevent or respond to a serious armed attack: the president would retain his existing discretionary power, as chief executive and commander in chief, to protect the nation in emergencies. Repealing the 2001 AUMF would, however, likely reduce the frequency with which the president resorts to targeted killings.

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4. The Constitution gives Congress the power to “define and punish offenses against the law of nations.” Without tying the president’s hands, Congress can pass a resolution clarifying that the international law of self-defense requires a rigorous imminence, necessity and proportionality analysis, and that the use of cross-border military force should be reserved for situations in which there is concrete evidence of grave threats to the United States or our allies that cannot be addressed through other means.
5. Congress and/or the Executive branch should create a non-partisan blue ribbon commission made up of senior experts on international law, national security, human rights, foreign policy and counterterrorism. Commission members should have or receive the necessary clearances to review intelligence reports and conduct a thorough policy review of past and current targeted killing policy, evaluating the risk of setting international precedents, the impact of U.S. targeted killing policy on allies, and the impact on broader U.S. counterterrorism goals.

In the absence of a judicial review mechanism, such a commission might also be tasked with reviewing particular strikes to determine whether any errors or abuses have taken place. The commission should release a public, unclassified report as well as a classified report made available to executive branch and congressional officials, and the report should continue detailed recommendations, including, if applicable, recommendations for changes in law and policy and recommendations for further action of any sort, including, potentially, compensation for civilians harmed by U.S. drone strikes. The unclassified report should contain as few redactions as possible.

6. Congress should urge the president to publicly acknowledge all targeted killings outside traditional battlefield within a reasonable time period, identifying those who were targeted, laying out (with the minimal number of appropriate redactions) the legal and factual basis for the decision to target, and identifying, to the best of available knowledge, death, property damage and injury resulting from the strike(s).
7. Congress should urge the president to release unclassified versions of all legal memoranda relating to targeted killing policy. In particular, U.S. citizens have a right to understand the government’s views on the legality of targeting U.S. citizens; there is no conceivable justification for failing to make this information public.
8. Congress should urge the president to also provide the public with information about the process through which targeting decisions outside traditional battlefields are made, the chain of command for such decisions, and internal procedures designed to prevent civilian casualties. Most military operational and legal manuals are publicly available, and this issue should be no different. If reports of a targeted killing “playbook” are accurate, an unclassified version should be released to the public.
9. Congress should urge the administration should convene, through appropriate diplomatic and track II channels, an international dialogue on norms governing the use of drone technologies and targeted killings. The goal should be to develop consensus and a code of conduct on the legal principles applicable to targeted killing outside a state’s territory,

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including those relating to sovereignty, proportionality and distinction, and on appropriate procedural safeguards to prevent and redress error and abuse.

10. Congress should consider creating a judicial mechanism, perhaps similar to the existing Foreign Intelligence Surveillance Court, to authorize and review the legality of targeted killings outside of traditional battlefields. While the Administration may argue that such targeting decisions present non-justiciable political questions because of the president's commander-in-chief authority, the use of military force outside of traditional battlefields and against geographically dispersed non-state actors straddles the lines between war and law enforcement. While the president must clearly be granted substantial discretion in the context of armed conflicts, the *applicability* of the law of armed conflict to a particular situation requires that the law be interpreted and applied to a particular factual situation, and this is squarely the type of inquiry the judiciary is best suited to making.

It is also worth noting that the practical concerns militating against justiciability in the context of traditional wartime situations do not exist to the same degree here. On traditional battlefields, imposing due process or judicial review requirements on targeting decisions would be unduly burdensome, as many targeting decisions must be made in situations of extreme urgency. In the context of targeted killings outside traditional battlefields, this is rarely the case. While the window of opportunity in which to strike a given target may be brief and urgent, decisions about whether an individual may lawfully be targeted are generally made well in advance.

A judicial mechanism designed to ensure that U.S. targeted killing policy complies with U.S. law and the law of armed conflict might take any of several forms. Most controversially, a court might be tasked with the *ex ante* determination of whether a particular individual could lawfully be targeted.

This approach is likely to be strenuously resisted by the Administration on separation of powers grounds, and it also raises potential issues about whether the Constitution's case and controversy requirement could be satisfied, insofar as proceedings before such a judicial body would, of necessity, be *in camera* and *ex parte*.⁸² This is also true for the existing FISA court, however, and its procedures have generally been upheld on Fourth Amendment grounds. It would seem odd to permit *ex parte* proceedings in an effort to ensure judicial approval for surveillance, but reject such proceedings as insufficiently protective of individual rights when an individual has been selected for lethal targeting rather than mere search and seizure.

I believe it would be possible to design an *ex ante* judicial mechanism that would pass constitutional and practical muster. It would be complex and controversial, however, and there is an alternative approach that might offer many of the same benefits with far fewer of the difficulties. This alternative approach would be to develop a judicial mechanism that conducts a *post hoc* review of targeted killings, perhaps through a statute creating a cause of action for damages for those claiming wrongful injury or death as a result of

⁸² See <http://www.lawfareblog.com/2013/02/why-a-drone-court-wont-work/>

APPENDIX

TO MAY 16, 2012 STATEMENT FOR THE RECORD SUBMITTED TO THE SENATE COMMITTEE ON ARMED SERVICES BY ROSA BROOKS

unlawful targeted killing operations. This would add additional incentives for executive branch officials to abide by the law, without placing the judiciary in the troubling role of authorizing or rejecting the use of military force in advance. While proceedings might need to be conducted at least partially in camera, judicial decisions in these cases could be released in redacted form.

It is not possible for this testimony to fully address the many permutations of potential judicial review mechanisms for targeted killing, but I hope this is an issue that will generate further discussion and inquiry in this sub-committee. To that end, it is worth noting that the notion of judicial review of targeted killing is one that has been validated by the courts of one of our closest allies, Israel.

The Israeli Supreme Court addressed the issue of targeted killing in a 2006 decision, and roundly rejected the view that targeted killing presents a non-justiciable issue.⁸³ The court insisted that the legality of each targeted killing decision must be individually considered in light of domestic and international legal requirements. It determined that while the conflict between Israel and Palestinian terrorist organizations was an international armed conflict, individual terrorist suspects were civilians who become targetable by virtue (and only by virtue) of their direct participation in hostilities, a concept the court analyzed in detail. The court also noted that international law requires independent investigations when civilians are targeted because of their suspected participation in hostilities. While specific judicial review mechanisms in the U.S. might reasonably be expected to vary from those in place in Israel, the Israeli experience strongly suggests that there is no inherent reason judicial review of targeted killings could not occur.

Conclusion

Mr. Chairman, Senator Cruz and members and staff of the subcommittee, we need to start talking honestly about drones, the activities they enable and the strategic and legal frameworks in which these activities take place. Drone critics need to end their irrational insistence on viewing drones as somehow inherently “immoral.” But drone strike boosters also need to engage in a more honest conversation, and grapple with the argument that although drone strikes appear to offer cheap and low-risk “quick fix” approach to counterterrorism, they may well be doing the U.S. as much harm as good.

In particular, we need to address the rule of law implications of U.S. targeted killing policy. Every individual detained, targeted, and killed by the U.S. government may well deserve his fate. But when a government claims for itself the unreviewable power to kill anyone, anywhere on earth, at any time, based on secret criteria and secret information discussed in a secret process by largely unnamed individuals, it undermines the rule of law.

⁸³ See http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.HTM

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One can argue, as the Obama Administration does, that current U.S. drone policy is entirely lawful, and perhaps this is so, if we're willing to take virtually everything about the strikes on faith, and don't mind jamming square pegs into round holes. But "legality" is not the same as morality or common sense. Current U.S. drone policy offers no safeguards against abuse or error, and sets a dangerous precedent that other states are sure to exploit.

Thank you once again for affording me this opportunity to testify. There is nothing preordained about how we use new technologies, but by lowering the perceived costs of using lethal force, drone technologies enable a particularly invidious sort of mission creep. When covert killings are the rare exception, they do not pose a fundamental challenge to the legal, moral, and political framework in which we live. But when covert killings become a routine and ubiquitous tool of U.S. foreign policy, we cannot afford to let them remain in the legal and moral shadows.

We need an honest conversation about how to bring targeted killings under a rule of law umbrella, by creating more transparent rules and more robust checks and balances. I am grateful to all of you for helping to foster such an honest conversation.

RESPONSES OF COL. MARTHA MCSALLY
TO QUESTIONS SUBMITTED BY SENATOR FRANKEN

Senate Judiciary Committee
Subcommittee on Constitution, Civil Rights and Human Rights
Hearing on "Drone Wars: The Constitutional and Counterterrorism Implications of
Targeted Killing"
April 23, 2013

Questions for the Record for Colonel Martha McSally

- The U.S. government has conducted a number of signature strikes against alleged members of al- Qaeda. Do you know what the government's process is for verifying that a target is indeed a member of al-Qaeda? Similarly, do you know how the administration determines what are "associated forces" of al-Qaeda?

I recommend you request a classified meeting with appropriate leadership and experts in the Intelligence Community and the Pentagon to discuss the process for approval of the use of lethal force against specific individuals. In my experience with the process while serving at United States Africa Command and at the unclassified level, it is my understanding that the process included building an intelligence case using multiple sources of intelligence over an extended period of time as well as a legal analysis as to whether the individual meets the criteria for use of lethal force as authorized by the Authorization for the Use of Military Force (AUMF). In my opinion for the AFRICOM theater, the intelligence and legal thresholds were very high.

A similar process was conducted to assess whether a group was considered an "associated force" of Al Qaeda, and in Africa, that threshold was also quite high. Additionally, just because an individual was approved in theory for use of lethal force, that did not mean we had permission to conduct a strike when all criteria were met. We required strike approval at very high levels of the chain of command with input from the Intelligence Community (IC), Pentagon, State Department, and National Security Council for each use of lethal force. A classified briefing with appropriate leadership and experts can provide details on the process and any variances in other theaters of operations.

- Can you explain when a lawful, tactically feasible drone strike on a potential target outside a clear battlefield -- for example in Yemen or Somalia -- becomes strategically unwise, and how that decision gets made?

I recommend you request a classified meeting with leadership and experts in the IC, Pentagon, State Department, and National Security Council to have a detailed discussion on current strategy in the war on terrorism and the role of lethal force in that strategy. As I mentioned in my testimony, once it is determined that the use of lethal force is legal by domestic and international law, there needs to be a determination as to whether a strike against a specific individual in a specific geographic location under specific circumstances is wise counter-terrorism strategy. The legal threshold usually is much broader than what could be strategically wise in the war on terrorism. Based on my experience and education in national/international security, counter terrorism, and security strategy, some of the strategic considerations are: the value of the individual in

terrorism leadership, planning, and operations; the positive or negative value in psychological and information operations; the willingness and/or ability of the host nation to conduct a capture/kill operation; the consent of the host nation and potential negative or positive impact on relations; the risk of civilian casualties; the cost of the operation; the risk to American lives; and the potentially negative or positive regional political impact. In AFRICOM's theater, this decision was made at very high levels of the chain of command with input from the Pentagon, State Department, Intelligence Community, and National Security Council.

MISCELLANEOUS SUBMISSIONS FOR THE RECORD



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The Honorable Dick Durbin
United States Senate
Committee on the Judiciary
Chair of the Subcommittee on The Constitution, Civil Rights, and Human Rights
224 Dirksen Senate Office Building
Washington, DC 20510

April 22, 2013

Dear Senator Durbin:

Please consider this letter as comment for the record on the upcoming April 23 hearing on *Drone Wars: The Constitutional and Counterterrorism Implications of Targeted Killing*.

The rise of the use of targeted killings is extremely concerning to the Bill of Rights Defense Committee (BORDC) and its national network of grassroots activists and organizers across the country. To date there has been no meaningful independent review of the executive branch's use of drones to kill people, including American citizens, abroad. As a result of this vacuum, it is no surprise that the administration has violated the secret self-limiting principles that it has articulated in the leaked OLC white paper. As a remedy, BORDC calls for transparency, compliance with the constitution and judicial review of targeted killing.

Transparency

As a starting point, BORDC strongly encourages the Senate to demand public disclosure of the legal standards and criteria used for drone strikes and targeted killing. While the administration's recent decision to disclose some of these standards and memos to the Senate Select Committee on Intelligence is a positive development, it is no substitute for broader transparency including the House and Senate Judiciary Committees.

Congressional oversight can only be truly meaningful when an informed public can communicate their views on an issue to their representatives. The public should not have to rely on leaked documents to divine the executive's justifications for engaging in targeted killings. Congress should demand speedy release of all documents that contain the administration's interpretation of law and policy related to targeted killing, in addition to further documents revealing the actual facts, in order to understand the impact of those laws and policies on the ground.

Compliance with the Constitution

The Due Process Clause of the Fifth Amendment provides essential protections, assuring that persons shall not be "deprived of life, liberty, or property, without due process of law." The process that can be distilled from the administration's leaked white paper on the targeting of US Citizens falls far short of the Fifth Amendment's mandate.

An analysis of the white paper suggests that the administration is disregarding well-established constitutional standards that govern the right to due process. While the paper pays lip service to the test established in *Matthews v. Eldridge* for determining the level of process due before the government deprives someone of life, liberty or property, it ignores a crucial piece of the test. Not only must the private interest at stake (here, life) be weighed against the government interest, *Matthews* requires taking into account "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards." The white paper fails to examine or include this part of the *Matthews* test in its analysis.

This omission cannot be dismissed as a nuance of case law. We know that the US government has killed at least two US citizens via drone attacks that government officials have claimed were accidents. The current process for targeting drones strikes thus clearly lacks sufficient safeguards to assure against the erroneous deprivation of life.

Judicial Review

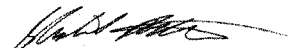
A meaningful guarantee of due process requires more than unreviewable executive fiat. Attorney General Eric Holder's assertion that "'Due process' and 'judicial process' are not one and the same, particularly when it comes to national security" leaves Americans little confidence that, if the administration believes they should be killed, they will receive more than an internal debate within the executive branch.

Any use of targeted killing must face, at the least, accountability measures from the courts to ensure that meaningful judicial review at some point, even if it is after the fact. If the purveyors of the program know that they will be held accountable for violations of the constitution, this will provide a bulwark against illegal killing.

We implore your committee to push for the full and public release of documents regarding targeted killing, independently investigate the impact of targeted killing and fill the void left by persisting secrecy, and take legislative action to bring the program in line with constitutional requirements.

For more information about the concerns raised in this letter, please feel free to reach Michael Figura at Michael@bordc.org or Shahid Buttar at shahid@bordc.org. We look forward to working with you and your colleagues as you continue to examine this vital arena.

Respectfully submitted,



Shahid Buttar
Executive Director

A Call from ICUJP to Stop Drone Killings - 2013

Interfaith Communities United for Justice and Peace (ICUJP) is deeply concerned about the proliferation of lethal unmanned aerial vehicles, commonly known as drones. The United States is leading the way in this new form of warfare where pilots in US bases kill people, by remote control, thousands of miles away. Drones have become the preferred weapons to conduct war due to the lack of direct risk to the lives of U.S. soldiers, but these drone strikes have led to the death of hundreds of innocent civilians in countries where we are not at war, including Pakistan, Yemen and Somalia.

Some aspects that we find particularly disturbing include:

- The President and his aides draw up a Kill List in which they play the role of prosecutor, judge, jury and executioner. People on this secret Kill List have never been charged, tried or convicted in a court of law, and are given no opportunity to surrender;
- The labeling of all military-age males in a strike zone as combatants, thus justifying their murder, is an extreme and macabre form of profiling;
- Drone strikes kill not only their intended targets, but innocent people, including children, violating the sanctity of human life;
- Drone strikes violate other nation's sovereignty (Pakistan's elected leaders, for example, have repeatedly called for an end to the strikes);
- Drones in the hands the CIA and the Joint Special Operations Command keeps the program veiled in secrecy. The lack of transparency and accountability violate the basic tenets of a democratic society;
- Drones make killing more abstract, impersonal, antiseptic, convenient and "easy";
- The Administration insists that because drones do not risk American lives, Congress need not be consulted, leading to a dangerous abuse of executive power;
- Drone strikes have replaced Guantanamo as the recruiting tool of choice for militants. They fuel anti-American sentiment, radicalize local populations and perpetuate an endless cycle of violence.
- The example being set by the United States that a nation can go anywhere it wants and kill anyone it wants on the basis of secret information is leading to a world of chaos and lawlessness.
- The global use of drones violates the "golden rule"--treat others as you wish to be treated-- since we would not want a foreign government to send drones to fly over our communities to kill people it deems a threat.
- Further, we note the penchant for exclusively vilifying and targeting Afro-Asiatic populations as explicitly racist (white supremacist). We are also concerned about the opening of a drone base in Niger, Africa.

The world's great religions teach us to cherish human life. This impersonal, risk-free killing of people on the other side of the globe runs counter to religious belief and the teachings of our traditions.

We urge our government to put an end to this secretive, remote-controlled killing and instead promote foreign policies that are consistent with the values of a democratic and humane society. We call on the United Nations to regulate the international use of lethal drones in a fashion that promotes a just and peaceful world community, based on the rule of law, with full dignity and freedom for every human being.



**Written Statement of the
Council on American-Islamic Relations**

On

**Drone Wars: The Constitutional and Counterterrorism Implications of
Targeted Killing**

Submitted to the

**Senate Committee on the Judiciary, Subcommittee on the
Constitution, Civil Rights and Human Rights**

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CAIR is America's largest Muslim civil liberties and advocacy organization. Its mission is to enhance the understanding of Islam, encourage dialogue, protect civil liberties, empower American Muslims, and build coalitions that promote justice and mutual understanding.

Chairman Durbin, Ranking Member Cruz and other members of the subcommittee, the Council on American-Islamic Relations (CAIR) thanks you for holding this first-ever Senate hearing on the constitutional and counterterrorism implications of targeted drone warfare and respectfully submits this written testimony for your consideration.

CAIR and the American Muslim community unequivocally condemn all acts of terrorism and support our nation's war against al-Qaeda and its allied forces. While pursuing this enemy, we as a nation must ensure that the rule of law and respect for human life is preserved while responsibly targeting al-Qaeda.

Our nation's use of and growing reliance on armed drones in remote areas of Afghanistan, Pakistan, Yemen, and Somalia has raised serious questions. Has the administration established a viable legal framework and procedures to oversee the use of targeted drone strikes inside and outside of designated zones of hostility? How is due process upheld for American citizens targeted by lethal drone strikes? What steps has the U.S. government taken to avoid civilian deaths and injuries, and has it compensated victims, their families, or communities when wrongful drone strikes occur?

Questions about Executive Authority and Process

Openness and transparency are the pillars of democracy. Despite this the Obama administration has publicly struggled with Congress to provide details on the legal framework, procedures and internal guidance governing its lethal drone strike program.

The administration has not disclosed to Congress or the public how it identifies or approves the placement of suspected individuals on "kill lists;" its operating procedures governing the positive identification of targeted individuals, implementation of targeted drone strikes, assessment of drone strike effectiveness, and confirmation of militant or civilian deaths or injuries; or what oversight is built into this process to ensure effectiveness and minimize civilian casualties.

While the administration has provided the Senate Intelligence Committee with classified Justice Department memos on its legal justification for the use of drone strikes against suspected al-Qaeda leaders and allied militants, the administration has not provided these memos to the U.S. Armed Services Committee, which oversees the Department of Defense (DoD) or the Judiciary Committee, which oversees the Department of Justice.

As commander-in-chief of the U.S. military, President Obama claims that his executive authority to lethally target suspected terrorists who pose an "imminent threat" derives from Article II of the U.S. Constitution. Moreover, the 2001 Authorization to Use Military Force act permits the administration to target "those nations, organizations, or persons [the president] 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," being al-Qaeda and the Taliban, as well as "associated forces" as defined by the National Defense Authorization Act of 2012.

The limit of this executive authority is tested outside of active combat zones in Afghanistan. Between 2004 and 2013, the U.S. has engaged in covert drone campaigns in Pakistan and Yemen, and recently Somalia, in which the DoD and CIA have lethally targeted al-Qaeda as well as Pakistani Taliban and others suspected to be militants based on their characteristics and patterns of behavior alone.

Targeting groups and suspected militants other than al-Qaeda and the Taliban has raised significant concern in Congress and the civil rights community over executive overreach and the U.S. pursuing an indefinite war against those not responsible for the events of September 11, 2001.

Questions about Due Process before Targeting American Citizens

The American Muslim community firmly repudiated Anwar al-Awlaki's incitement to violence, which began after he left the United States. In addressing the September 2011 drone strike in Yemen that killed Anwar al-Awlaki and the attack two weeks later that killed his 16-year-old son Abdurrahman, CAIR was joined by a number of prominent civil liberties organizations in urging Congress and the president to address the constitutional issues raised by the assassination of American citizens without due process of law.

CAIR remains concerned that the administration has not fully informed the nation or allowed judicial oversight of the legal justifications currently being used to kill American citizens abroad. While a few members of Congress have been given access to Department of Justice memos that outline the Obama administration's constitutional and legal justification for the targeted killings of Americans citizens overseas, CAIR believes that greater public transparency and disclosure is needed.

Questions about Civilians Deaths and Moral Authority

During CIA Director John Brennan's February 2013 confirmation hearing before the Senate Intelligence Committee he reported that the number of civilian casualties caused by U.S. drones strikes each year have "typically been in the single digits."

While the U.S. drone strike program remains classified, the "Year of the Drone" project by the New America Foundation currently estimates that from 2004 to 2013, the U.S. has engaged in 428 drone strikes in Pakistan and Yemen that have resulted in 2,439 to 3,982 deaths. Of these 1,982 to 3,251 were classified as militants, 276 to 368 were civilians, and 200 to 330 were unknown.

Media and non-profit organizations have reported that in its first term the Obama administration carried out six times as many lethal drone strikes as the Bush administration in its eight years in office. And while media report that the use of drone strikes is waning in Pakistan, there are an equal number of reports of new drone strikes in Yemen and Somalia.

While CAIR does not concede that the Obama administration has the legal authority to use force outside of recognized zones of armed conflict, we are particularly concerned about how the drone program has killed and injured persons with no established connection to terrorism. In pursuing al-Qaeda and its allied forces, the U.S. cannot concede its moral authority by hastily using its lethal weapons and technology to needlessly take lives and injure innocent civilians.

Groups like al-Qaeda seek to capitalize on such preventable mistakes and popular resentment built around civilian casualties. Likewise, civilian and government opposition to drone strikes in Pakistan and Yemen have been fueled by such civilian deaths that have been judged by local communities to be not “collateral damage” but as reckless and indiscriminant killings by the U.S. government. If drone strikes are meant to cripple organizations like al-Qaeda, then our counter-terrorism programs should not be used to inspire the next generation of militant leaders.

Recommendations to Congress

With regards to establishing a more transparent and accountable legal framework under which the U.S. targeted drone strike program can reasonably operate, CAIR recommends that Congress:

- Continue to exercise oversight by requesting all administration operating procedures and guidelines governing its covert drone strike program, declassifying and making public as much information as possible.
- Determine how international law applies to U.S. drone strikes inside and outside of areas Congress has declared as zones of hostility.
- Ensure that the administration and corresponding defense and intelligence agencies are operating under similar guidelines and legal frameworks.
- Ensure that the administration has clearly defined how it determines whether a person is labeled a militant or a member of a militant group or is considered to be a civilian.
- Ensure that the administration is correctly recording and reporting the number of militant and civilian deaths and injuries contributed to the drone strike program, as well as other lethal and destructive modes of combat.
- Ensure that the U.S. government is adequately compensating civilian drone strike victims, their families, and communities.
- Publicly address and debate the impact of civilian deaths and injuries and breaches of other nations’ sovereignty as it relates to the war on terrorism.
- Hold follow-up hearings on the operating authority and legal framework under which the administration carries out its armed drone strike program.
- Hold follow-up hearings on the number of civilian casualties, amount of property damage, and rise in militancy that has resulted from the administration’s U.S. targeted drone strikes.

With regards to the high number of civilian casualties, CAIR recommends that Congress seek clarification from the administration in the following areas:

- How the administration categorizes persons killed or injured in drone strikes that are in close proximity to officially targeted individuals; when a bystander is killed or injured are they recorded as a civilian or a militant; and, are military age males killed or injured in such strikes always considered militants.
- What procedures exist to record and report the total number of civilian or militant deaths or injuries that have resulted from the U.S. drone program?
- What procedures exist to protect civilians from targeted drone strikes? Do these procedures differ between drone strikes carried out by the CIA or DoD?
- According to the administration, what is an acceptable number of civilian lives lost?
- What is the administration's policy for collecting information about who was killed after drone strikes occur?
- What is the administration's policy for acknowledging civilian casualties from drone strikes and compensating victims, their families, or communities?
- What overview or accountability exists for departments, agencies or individuals who make outstanding mistakes in incorrectly nominating or targeting civilians in drone strikes or carrying out strikes that cause unacceptable levels of civilian casualties?

Conclusion

CAIR looks forward to Congress exerting its authority over the administration to hold the executive branch responsible for establishing transparent and accountable guidelines and procedures that better define the U.S. drone program's legal framework. We hope that this program can be used to effectively combat al-Qaeda and its allied forces without sacrificing the rule of law, due process, or the goodwill of civilian populations.

**Statement of Chicago Area Peace Action to the Senate Judiciary
Subcommittee on the Constitution, Civil Rights and Human Rights
“Drone Wars: The Constitutional and Counterterrorism
Implications of Targeted Killings”
Dirksen Senate Office Building, Room 226**

Michael Lynn for Chicago Area Peace Action

Chicago Area Peace Action (CAPA) would like to thank Chairman Durbin, Ranking Member Cruz and Members of the Subcommittee for the opportunity to address this critical issue.

The topic of targeted assassinations, in the form of drone attacks, is a very timely one. Recent revelations buttress the opinion of CAPA that targeted assassinations and drone strikes, as U.S. military and intelligence units are currently carrying them out, are illegal under the U.S. Constitution and international law. We further hold that such actions violate not only moral conscience, but also the accepted norms for civilized societies. We would further submit that such actions have had a corrosive effect on the status of the U.S. as a nation governed by laws and have negatively impacted the standing of our nation as an example for the rest of the world.

We would like to examine each of these points in turn.

I. Legal Concerns

Although the Obama administration continues to refuse to confirm or deny the existence of its drone strike program, many of the outlines of the program and its policy framework are well known. Strategic leaks to the press have made much of the U.S. public aware of the ‘kill lists’ that President Obama personally reviews and approves on Tuesday mornings. We know that the legal guidelines governing these acts are very broad and rather ill defined. The President has claimed the right to target anyone, including American citizens, for assassination anywhere in the world at any time at his sole discretion. Attorney General Eric Holder reinforced just how broad this power is taken to be in a recent letter to Senator Rand Paul. In response to a query from Paul as to whether the President claims the right to authorize lethal force, such as a drone strike against an American citizen on American soil, the Attorney General replied in the affirmative.

This breathtaking assertion makes crystal clear just how far out on a legal limb the Administration has gone. The Fifth Amendment to the U.S. Constitution states, “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against

himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The power of the state to deprive a citizen of life is the most awesome power the state wields. The manner in which such decisions are made is a matter of supreme importance. While no one would question the President's ability to conduct war as he sees fit, targeted assassinations are currently being carried out in nations with which the U.S. has no declared hostilities. As stated above, the highest law enforcement officer in the land has declared that the President claims the right to act as judge, jury and executioner for anyone, even American citizens, anywhere in the world, including on American soil. All of this is being done with no transparency and no accountability. CAPA would submit that this policy not only stands in violation of the Fifth Amendment to the U.S. Constitution, but also represents a gross legal overreach on the part of the Executive branch. We join with columnist and Constitutional lawyer Glenn Greenwald in stating, "If you believe the president has the power to order US citizens executed far from any battlefield with no charges or trial, then it's truly hard to conceive of any asserted power you would find objectionable."

The Obama administration has repeatedly claimed that its drone strikes target only known senior leaders of al Qaida and allied groups. A recent report by McClatchy national security correspondent Jonathan Landay, "Obama's drone war kills 'others,' not just al Qaida leaders," shows that claim is simply untrue. Classified documents obtained by the papers show the strikes "have targeted and killed hundreds of suspected lower-level Afghan, Pakistani and unidentified 'other' militants in scores of strikes in Pakistan's rugged tribal area." The report quotes Micah Zenko, an expert from the Council on Foreign Relations, that the administration is "misleading the public about the scope of who can legitimately be targeted."

Furthermore, the piece reports that "drone operators weren't always certain who they were killing despite the administration's guarantees of the accuracy of the CIA's targeting intelligence and its assertions that civilian casualties have been 'exceedingly rare.'" It is widely known that the U.S. is using so-called 'signature strikes,' wherein people are targeted for assassination based upon their patterns of behavior, without knowing their identities or affiliations. The criteria used to trigger these attacks remains unknown. The reliability of targeting information was a key cornerstone of the legal basis for drone strikes offered under the 2001 Authorization for the Use of Military Force. The use of such wide-ranging and anonymous targeting violates even that flimsy legal fig leaf.

Nor do such extreme measures pass muster under international law. After a three-day fact-finding mission to Pakistan in March of this year, the United Nations terrorism and human rights envoy issued a statement calling drone strikes in Pakistan a violation of international law. He observed, "The position of the government of Pakistan is quite clear: It does not consent to the use of drones by the United States on its territory and it considers this to be a violation of Pakistan's

sovereignty and human rights.” At a time of heightening international tensions, what credibility will the U.S. have in calling on other nations to observe international law when it is itself in violation?

II. Moral and Normative Concerns

It isn't only legal concerns that underlie our objections to targeted assassinations and drone strikes. Targeted assassinations have long been regarded as anathema to the ideals of a civilized society. In the past, the U.S. has rightly condemned this practice.

President Obama has routinely referred to the religious doctrine of just war theory in attempting to justify U.S. drone attacks. But this justification fails on a number of points. In most accepted formulations of just war theory, violence can be directed only against belligerents and not against innocent civilians. As has become apparent in the last few years, the U.S. drone program is killing far more civilians than the Obama administration has claimed. Not only that, but the supposedly 'high level' al Qaida operatives that are claimed as victims are far outnumbered by civilians. A Stanford Law School/New York University School of Law study shows that fewer than two 2% of those killed by American drone strikes are 'high-level' targets.

The report further finds that the number of civilians killed is not the zero-to-very-few that the administration claims. Indeed, the study shows that U.S. drone strikes in Pakistan kill almost 50 civilians for every known terrorist. Those figures include only deaths that can be established to a high degree of certainty.

More horrifying, much of this carnage seems to be intentional. The U.S. is known to employ so-called 'double-tap' strikes where a target is hit a second time immediately following the initial strike, killing and wounding first responders. Surely no theory of just war can support the use of force that results in such massive collateral carnage while doing so little to deter any potential attack.

Nor can it be shown that drone attacks are effective in preventing an attack on the U.S. that is 'imminent,' as just war theory requires. The simple fact that these attacks are so ineffective in hitting the putative targets — high-level al Qaida officials — shows that this test is not met.

III. Corrosive Effects on the Nation

It should by now be quite obvious that, far from achieving its goal of making Americans safer, the drone program is having exactly the opposite effect. Afghans and Pakistanis not only see their loved ones and friends killed and injured in drone attacks launched by the U.S., they live with the constant dread that comes from knowing that death can rain down upon them from the sky at any time without warning. It does not take much imagination to conceive of the reactions to living in such circumstances: intense hatred of the perpetrator and the desire to seek

revenge and remove the threat. It would appear obvious that drone attacks are the best possible recruiting tool we could offer terrorist groups.

The negative effects of drone attacks do not stop at our shores. At home we face a government that operates largely in the dark, without the knowledge or consent of the people. The administration continues to refuse to acknowledge or deny the existence of a drone program the entire world knows about. With each new revelation of lies and cover-ups, our government becomes more and more opaque and goes to ever-greater lengths to protect its secrets. An administration that came to office promising to be the most transparent in American history has now prosecuted more American whistleblowers under the Espionage Act than all other administrations in U.S. history combined. The existence of poorly conceived programs like targeted assassinations and drone attacks inevitably leads to a diminution of democracy and an increase in abuse of power and corruption.

IV. Conclusion

It should be clear from the preceding that Chicago Area Peace Action is strongly opposed to the policy of U.S. targeted assassinations via drone attacks. We believe that this policy is indefensible, both morally and legally, and makes the country more vulnerable, not less. We call on Congress to reclaim their powers of oversight. We ask this Subcommittee to press the administration to release more information about both the program's legal basis and the methodology used in targeting individuals. The administration needs to be held responsible to answering for the extremely credible reports of widespread civilian casualties. The American people need an answer as to why the administration is targeting a much wider range of individuals than the senior al Qaida officials it claims. Most of all, the American people deserve the information they need to decide whether this is a program worthy of great nation and whether this is a program they can support in good conscience.

WRITTEN TESTIMONY

SUBMITTED BY PROFESSOR JAMES L. CAVALLARO, STANFORD LAW SCHOOL, TO SEN. DURBIN AND THE SENATE JUDICIARY SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND HUMAN RIGHTS (April 22, 2013)

I would like to thank Senator Durbin for convening the hearing “Drone Wars: The Constitutional and Counterterrorism Implications of Targeted Killing,” and for inviting me to submit written testimony. My name is James Cavallaro; I am a Professor of Law at Stanford Law School, where I direct the International Human Rights and Conflict Resolution Clinic, and the Stanford Human Rights Center. In late September 2012, a team of researchers at Stanford Law School that I oversaw, along with colleagues at New York University’s School of Law, released an extensive report, entitled *‘Living Under Drones: Death, Injury and Trauma to Civilians from US Drone Practices in Pakistan.’* Based on nine months of intensive research—including two investigations that I led in Pakistan, more than 130 interviews with victims, witnesses, and experts, and review of thousands of pages of documentation and media reporting—our report concluded that drones have killed a significant number of civilians, that they have intimidated entire populations living under constant surveillance, and that their use may be counterproductive at many levels. The report also raises grave doubts about the legality and effectiveness of particular aspects of the drone campaign.

Recent developments and revelations corroborate the major findings of our report. New evidence has emerged to support our conclusion that a significant number of civilians have been killed by US drone strikes. Further, a growing number of highly-informed analysts and officials, including Generals James Cartwright and Stanley McChrystal, have warned that the drone program may well be counterproductive to US interests. Newly-released documents and reporting provide additional bases to question the legality of aspects of the drone campaign. A leaked Department of Justice White Paper (the ‘White Paper’), which purports to summarize the legal standards for a small proportion of drone strikes, departs significantly from established law, particularly in its definition of

the concept of imminence. New information suggests that some US drone strikes fail to comply either with established principles of domestic and international law or the framework set forth in the White Paper. I will explore each of these developments in turn.

Evidence of Harms to Civilians

New developments corroborate our finding that more civilians have died in drone strikes than the US government has acknowledged. The best evidence currently available, from the Bureau of Investigative Journalism (TBIJ), indicates that from June 2004 through April 2013, drone strikes have killed between 2,541 and 3,553 people in Pakistan, including 411-884 civilians and at least 168 children.¹ Our report explained in significant detail why the TBIJ's data are more reliable than other publicly-available aggregators. In February of this year, Senator Lindsey Graham stated that US drone strikes had killed 4,700 individuals, including civilians, a figure consistent with TBIJ's high-end estimate of drone fatalities.² In October of last year, the Human Rights Clinic at Columbia Law School released a report that found TBIJ's data to be the most reliable of the major drone data aggregators.³

One example of such civilian drone fatalities we identify in our report was one of two fatal strikes on January 23, 2009, in the Waziristan region of Pakistan. Our research team met with Faheem Quershi in March 2012, just over three years after he was severely injured in a drone strike. Faheem was 14 when a missile fired from a US drone struck the home he was visiting. It slammed into the center of a nearby room, destroying the ceiling and roof, and shattering all the windows.⁴ Faheem suffered a fractured skull as well as shrapnel wounds and burns across the left side of his body and face.⁵ The blast killed at

¹ *Covert War on Terror*, THE BUREAU OF INVESTIGATIVE JOURNALISM, <http://www.thebureauinvestigates.com/category/projects/drones/> (last visited Apr. 22, 2013).

² Olivier Knox, *Drones have killed 4,700, U.S. senator says*, YAHOO NEWS (February 21, 2013) <http://news.yahoo.com/blogs/ticket/drones-killed-4-700-u-senator-says-141143752--politics.html>

³ HUMAN RIGHTS CLINIC, COLUMBIA LAW SCHOOL, COUNTING DRONE STRIKE DEATHS 5 (2012), *available at* <http://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/COLUMBIACountingDronesFinal.pdf>

⁴ Interview with Faheem Qureshi, in Islamabad, Pakistan (Mar. 2, 2012).

⁵ *See id.*; Complaint Against the United States of America for the Killing of Innocent Citizens of the Islamic Republic of Pakistan to the UN Human Rights Council 10 (Feb. 23, 2012), *available at* http://repreive.org.uk/media/downloads/2012_02_22_PUB_drones_UN_HRC_complaint.pdf?utm_source=

least seven people, including a cousin and two uncles.⁶ Faheem lost his left eye and his hearing in one ear.⁷ Accounts from highly-respected journalists Bob Woodward and Daniel Klaidman have indicated that high level authorities realized shortly after the January 23, 2009 strikes that these had caused significant number of civilian casualties.⁸

Though not the subject of recent revelations, the everyday effect of drone presence and drone strikes warrant mention. Our report revealed that beyond death and physical injury, drones have also caused considerable and under-accounted-for harm to the daily lives of ordinary civilians. Drones have hovered twenty-four hours a day over communities in parts of northwest Pakistan, striking homes, vehicles, and public spaces without warning. Those living under drones face the constant worry that a deadly strike may be fired at any moment, killing or maiming them or their family members. This everyday reality has created severe anxiety and tension in affected areas. We interviewed medical professionals who have treated patients from the affected area; they told us of the devastating impact of the presence of drones on their patients, many of whom suffer from PTSD, nervous disorders and somatizations as a result of drones and drone strikes.⁹

These fears have also affected behavior and disrupted social life in the areas of Pakistan subject to drone surveillance and strikes. Some community members shy away from gathering in groups, including for weddings, funerals, or tribal dispute-resolution bodies, out of fear that they may attract the attention of drone operators. Some parents choose to

[Press+mailing+list&utm_campaign=89f3db0a75-2012_02_23_drones_UN_complaint&utm_medium=email](#)

⁶ Interview with Interview with Ejaz Ahmad, in Islamabad, Pakistan (Mar. 2, 2012); Interview with Faheem Qureshi, in Islamabad, Pakistan (Mar. 2, 2012); *see* Complaint to UNHRC, *supra* note 4, at 5-6.

⁷ Interview with Faheem Qureshi, in Islamabad, Pakistan (Mar. 2, 2012); *see also* Complaint to UNHRC, *supra* note 4, at 5-6.

⁸ BOB WOODWARD, OBAMA'S WARS 93 (2010) ("Neither strike killed the intended 'HVT', or high value target, but at least five Al Qaeda militants died... The president said good. He had fully endorsed the covert action program and made it clear he wanted more."); DANIEL KLIDMAN, KILL OR CAPTURE: THE WAR ON TERROR AND THE SOUL OF THE OBAMA PRESIDENCY 40 (2012).

⁹ *See* Interview with Sulayman Afraz (anonymized name and location), in Pakistan (2012). Afraz is a psychiatrist who has treated patients from Waziristan whom he has diagnosed with PTSD. He described his patients as having "the classic PTSD symptoms: restlessness, inability to sleep, flashbacks, nightmares, [and] hyper startle reaction"; *see also* Interview with Ateeq Razzaq (anonymized name and location), in Pakistan (2012) (describing treating a number of cases of PTSD related to drones); Interview with Abbas Uddin (anonymized name and location), in Pakistan (2012); *see also* Interview with Abbas Uddin (anonymized name and location), in Pakistan (2012).

keep their children home from school; some children, fearful and traumatized by drone strikes, have dropped out of classes.

Counterproductive Nature of Drone Practices

Second, new voices have warned that drone strikes may not be making the US safer overall. In recent months, Generals James Cartwright and Stanley McChrystal have publicly warned of ‘blowback’ and ‘resentment’ from US drone practices that may threaten US security.¹⁰ These voices join former director of National Intelligence Dennis Blair, Admiral Mike Mullen, members of Congress and others.

Our report points out that drones may foment anti-American sentiment and aid recruitment to armed non-state actors. As 26 Members of Congress noted in a June 2012 letter to President Obama, drones are “faceless ambassadors of death” to communities which otherwise know little about the United States.¹¹ In rural areas of Pakistan with very low literacy rates and little access to media, many people know nothing about the United States except what they experience through drone strikes. One 18-year-old that I spoke with in Pakistan admitted, “[f]rankly speaking, before the drone attacks, I didn’t know anything about a country called America.” As a result of the strikes, as another interviewee told our research team, “almost all people hate America.”¹² In fact, according to a 2012 poll by the Pew Research Center’s Global Attitude project, 74% of Pakistanis consider the US an enemy. This is up from 64% in 2009.¹³ The *New York Times* has reported, “drones have replaced Guantánamo as the recruiting tool of choice for

¹⁰ Robert Dreyfuss, *General Cartwright Warns of Drone ‘Blowback,’* THE NATION (March 22, 2013), <http://www.thenation.com/blog/173486/general-cartwright-warns-drone-blowback>; Alexis C. Madrigal, *General McChrystal on Drones: ‘They Are Hated on a Visceral Level,’* THE ATLANTIC (Jan. 7, 2013) <http://www.theatlantic.com/technology/archive/2013/01/general-mcchrystal-on-drones-they-are-hated-on-a-visceral-level/266914/>.

¹¹ Letter from Dennis Kucinich *et al.* to President of the US Barack Obama (June 12, 2012), available at http://kucinich.house.gov/uploadedfiles/061212_drones.pdf.

¹² Interview with Umar Ashraf (anonymized name), in Islamabad, Pakistan (Mar. 9, 2012); see also Interview with Saad Afridi (anonymized name), in Islamabad, Pakistan (Feb. 26, 2012) (“Before drone attacks, I didn’t know America.”).

¹³ PEW RESEARCH CENTER, PAKISTANI PUBLIC OPINION EVER MORE CRITICAL OF U.S.: 74% CALL AMERICA AN ENEMY (2012), available at <http://www.pewglobal.org/files/2012/06/Pew-Global-Attitudes-Project-Pakistan-Report-FINAL-Wednesday-June-27-2012.pdf>.

militants.”¹⁴ Such counterproductive effects are not confined to Pakistan. In Yemen, membership in Al Qaeda in the Arabian Peninsula has more than tripled in recent years as drone strikes there have intensified, according to analyst and scholar Gregory Johnsen.¹⁵

There are several other reasons to question the strategic value of drone strikes. Drones are only as accurate as the intelligence on which they are based. Similar intelligence led to massive over arrests in Guantanamo. Recall that over 80% of those detained there have been released by US authorities.¹⁶ What if the same proportions hold for those targeted by US drones? Additionally, targeted killing and strike practices may establish dangerous precedents and undermine the rule of law. At least 76 countries and likely some non-state actors now have drones, including China and Iran.¹⁷ It is believed that as many as ten of these states have already developed weaponized drones. Would we want these states to use drones as we have in Pakistan?

Legal Concerns

Third, newly public information on the Obama Administration’s understanding of the legal standards governing drone strikes raises more concerns about the legality of particular drone strikes and practices. The White Paper leaked earlier this year has generated significant debate about the legality of targeting U.S. citizens who are senior operational leaders of al-Qaeda or associated forces.¹⁸ The legal argument advanced, though, sharply diverges from established law in several ways.

¹⁴ Jo Becker & Scott Shane, *Secret ‘Kill List’ Proves a Test of Obama’s Principles and Will*, N.Y. TIMES (May 29, 2012), <http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?pagewanted=all>.

¹⁵ Gregory Johnsen, *THE LAST REFUGE: YEMEN, AL-QAEDA, AND AMERICA’S WAR IN ARABIA*, 2012.

¹⁶ *The Guantanamo Docket: A History of the Detainee Population*, N.Y. TIMES (July 11, 2012), <http://projects.nytimes.com/guantanamo/>.

¹⁷ US GOV’T ACCOUNTABILITY OFFICE, GAO-12-536, *AGENCIES COULD IMPROVE INFORMATION SHARING AND END-USE MONITORING ON UNMANNED AERIAL VEHICLE EXPORTS* 9 (2012); *see also* Micah Zenko, *10 Things You Didn’t Know About Drones*, FOREIGN POL’Y (Mar./Apr. 2012), *available at* http://www.foreignpolicy.com/articles/2012/02/27/10_things_you_didnt_know_about_drones?page=0.3 (placing the figure at 44-70 countries).

¹⁸ Department of Justice White Paper, *Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who is a Senior Operational Leader of Al-Qa’ida or An Associated Force*, *available at* http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf

The White Paper stretches the concept of ‘imminence’ such that it differs greatly from its traditional legal definition. The White Paper proposes that a threat can be ‘imminent’ even when the U.S. does not have “clear evidence that a specific attack on U.S. persons and interests will take place in the immediate future.”¹⁹ The relevant international law standard for over one hundred and seventy years not only requires a specific threat to exist, but also requires that threat to be “instant, overwhelming, and leaving no choice of means, and no moment for deliberation.”²⁰

The position that the U.S. may legally use force against groups associated with al-Qaeda may overstep the boundaries of Congress’s authorization, given that the AUMF is limited to those involved with the September 11, 2001 attacks. The AUMF itself should be questioned as the basis for ongoing drone strikes; as Senator Durbin recently stated, “I don’t believe many, if any, of us believed when we voted for [the AUMF]—and I did vote for that—that we were voting for the longest war in the history of the United States and putting a stamp of approval on a war policy against terrorism that, 10 years plus later, we’re still using.”²¹

Moreover, new evidence supports the inference that some aspects of the drone program fall outside of the norms established by domestic and international law, particularly when US drone strikes appear to target individuals who do not pose an imminent threat to the U.S. A new book by Pulitzer-prize-winning journalist Mark Mazzetti, *The Way of the Knife: The C.I.A., a Secret Army, and a War at the Ends of the Earth*, as excerpted recently in the *New York Times*, documents how the first U.S. targeted killing in Pakistan

¹⁹ Department of Justice White Paper, *Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who is a Senior Operational Leader of Al-Qa’ida or An Associated Force*, available at http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf

²⁰ See Special Rapporteur on extrajudicial, summary or arbitrary executions, *Study on Targeted Killings*, Human Rights Council, UN Doc. A/HRC/14/24/Add.6, ¶ 45 (May 28, 2010) (by Philip Alston), available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf>; see also Letter from Daniel Webster, US Secretary of State, to Lord Ashburton, (Aug. 8, 1842), in BARRY E. CARTER & ALLEN S. WEINER, *INTERNATIONAL LAW* 936-37 (6th ed. 2011). Webster’s statement, which emerged from a diplomatic incident between the US and U.K. over the killing of US citizens in British Canada in 1837 (known as the *Caroline* case), has come to be the customary international legal standard for preemptive self-defense.

²¹ Siobhan Gorman, Adam Entous & Julian E. Barnes, *U.S. to Shift Drone Command*, WALL ST. J., (Jan. 7, 2013), <http://online.wsj.com/article/SB10001424127887324103504578372703357207828.html>

in June 2004 struck an individual who “was not a top operative of Al-Qaeda, but a Pakistani ally of the Taliban who led a tribal rebellion.”²² Branded an “enemy of the state” by Pakistan, the C.I.A. “agreed to kill him in exchange for access it had long sought so it could hunt down its own enemies.”²³

The drone strike data we gathered, reviewed in light of parallel developments in US-Pakistani relations and drawing on findings from the Congressional Research Service (CRS), provides further evidence to suggest that drone strikes have sometimes been used to send a message to, cajole, or otherwise affect relations with the Pakistani government.

Take, for example, the events that followed the arrest of CIA contractor Raymond Davis, who reportedly killed two men in Pakistan on January 27, 2010. Pakistani authorities arrested Davis on that same day, January 27. Although the US had launched six strikes in the three weeks preceding his arrest (January 6-27), it did not strike again for over three weeks after the incident. During this period, US authorities engaged in a high-level lobbying campaign to ensure the release of Davis.²⁴ Some attribute the pause in drone strikes to US efforts to secure Davis’s release and/or to “avoid angering a population already riveted by the Davis arrest.”²⁵ Then, in the period between February 20 and Davis’s eventual release on March 16, the US launched eleven strikes, perhaps to pressure Pakistan to free Davis. Following the March 16 release, with the exception of a single major strike the following day, the US did not authorize another strike afterwards for almost a month (until April 13).²⁶ Based on this incident and two others it studied,

²² Mark Mazzetti, *A Secret Deal on Drones, Sealed in Blood*, N.Y. TIMES (April 6, 2013), http://www.nytimes.com/2013/04/07/world/asia/origins-of-cias-not-so-secret-drone-war-in-pakistan.html?pagewanted=all&_r=0

²³ *Id.*

²⁴ Mark Mazzetti, Ashley Parker, Jane Perlez & Eric Schmitt, *American Held in Pakistan Worked With C.I.A.*, N.Y. TIMES (February 21, 2012), http://www.nytimes.com/2011/02/22/world/asia/22pakistan.html?_r=1&pagewanted=all.

²⁵ Ishtiaq Mashud, *Al Qaeda Figure Believed Killed in US Drone Strike*, WASH. TIMES (Feb. 21, 2011), <http://www.washingtontimes.com/news/2011/feb/21/al-qaeda-figure-believed-killed-us-drone-strike/?page=all>.

²⁶ For full details, refer to Appendix C of the Stanford/NYU report, *Living Under Drones*. In a similar vein, strikes fluctuated significantly during the time period immediately before and after the May 2012 *New York Times* investigative piece on targeted killing. Becker & Shane, *supra* note 14. The revelations in the *Times* piece were widely perceived as a boon to Obama’s popularity at home. See, e.g., Charles Krauthammer, *Barack Obama: Drone Warrior*, WASH. POST (May 31, 2012),

CRS concluded that “[m]essaging to Pakistan appears to continue to be part of the [drone] program’s intent.”²⁷

The White Paper focuses on the legal rationale for a single drone strike: the one that reportedly killed US citizen Anwar Al-Awlaki. The vast majority of strikes have targeted non-Americans and individuals who are *not* high-level members of Al-Qaeda. According to Peter Bergen and Megan Braun of the New American Foundation, high-level targets account for only 2% of drone fatalities.²⁸ These findings were corroborated by a recent investigation by Jonathan Landay of McClatchy, who found that during the 12-month period in Pakistan ending in September 2011, top Al Qaeda leaders represented only 1.2% of those killed in drone strikes.²⁹ Our report raises questions about some of the practices that may account for the killing of significant numbers of low-level combatants and civilians, including ‘signature’ strikes,³⁰ which do not target particular individuals, but rather unidentified individuals or groups of men with “defining characteristics associated with terrorist activity.”³¹ Just what those “defining characteristics” are has not been made public. Last year, the *New York Times* paraphrased a view shared by several officials that “people in an area of known terrorist activity, or found with a top Qaeda operative, are probably up to no good.”³² The *Times* has also reported that authorities presume all military-aged males killed in strikes to be “combatants,” absent posthumous

http://www.washingtonpost.com/opinions/barack-obama-drone-warrior/2012/05/31/gJQAr6zQ5U_story.html. The US launched nine strikes across North Waziristan in the seven days before and after the *Times* piece although it had not launched a single strike in the two weeks preceding that period and only two in the subsequent two weeks. For full details, refer to Appendix B.

²⁷ K. ALAN KRONSTADT, CONG. RESEARCH SERV., R41832, PAKISTAN-US RELATIONS 22 (2012), available at <http://fpc.state.gov/documents/organization/193708.pdf>.

²⁸ Peter Bergen & Megan Braun, *Drone is Obama’s Weapon of Choice*, CNN (Sept. 6, 2012), <http://www.cnn.com/2012/09/05/opinion/bergen-obama-drone/index.html>.

²⁹ Jonathan S. Landay, *Obama’s drone war kills ‘others,’ not just al Qaeda leaders*, MCCLATCHY NEWSPAPERS (April 9, 2013) <http://www.mcclatchydc.com/2013/04/09/188062/obamas-drone-war-kills-others.html>.

³⁰ David S. Cloud, *CIA Drones Have Broader List of Targets*, L.A. TIMES (May 5, 2010), <http://articles.latimes.com/2010/may/05/world/la-fg-drone-targets-20100506>; see Daniel Klaidman, *Drones: How Obama Learned to Kill*, DAILY BEAST (May 28, 2012, 1:00 AM) (excerpt from Klaidman’s book *KILL OR CAPTURE: THE WAR ON TERROR AND THE SOUL OF THE OBAMA PRESIDENCY* 41 (2012)), <http://www.thedailybeast.com/newsweek/2012/05/27/drones-the-silent-killers.html>.

³¹ KLAIDMAN, *supra* note 8 at 41; see also Becker & Shane, *supra* note 14 (“In Pakistan, Mr. Obama had approved not only ‘personality’ strikes aimed at named, high-value terrorists, but ‘signature’ strikes that targeted training camps and suspicious compounds in areas controlled by militants.”).

³² Becker & Shane, *supra* note 14.

evidence that they were in fact civilians.³³ The U.S. government has not publicly indicated that it has conducted post-strike investigations to identify such posthumous evidence. This confluence of factors has raised significant doubts among many about the legality of these targeted killing operations; according to Scott Shane of the *New York Times*, as well other anonymous sources inside the administration, even high-level executive branch authorities have questioned the legality of US ‘signature’ strikes.³⁴

Although the issue has not been the subject of recent news, our report also documents instances of “double tapping,” a practice whose legality has been questioned. A double tap occurs when a drone fires a second or third hellfire missile at the same target shortly after an initial strike. The Bureau of Investigative Journalism has confirmed more than a dozen instances in which secondary strikes have killed rescuers and first responders when they have approached a strike site to help the wounded.³⁵ A father of four, who lost a leg in a drone strike, told us, “we and other people are so scared of drone attacks now that when there is a ...strike, for two or three hours no one goes close.”³⁶ A health professional familiar with North Waziristan revealed to us that, as a result of this practice, one humanitarian organization has a “policy to not go immediately [to a reported drone strike] because of follow up strikes. There is a six hour mandatory delay.”³⁷ U.N. Special Rapporteur on extrajudicial, summary or arbitrary executions Christof Heyns has observed, “[I]f civilian ‘rescuers’ are indeed being intentionally targeted, there is no doubt about the law: those strikes are a war crime.”³⁸

³³ *Id.*

³⁴ Margaret Sullivan, ‘Targeted Killing,’ ‘Detainee,’ and ‘Torture’: Why Language Choice Matters, NY TIMES (April 12, 2013) <http://publiceditor.blogs.nytimes.com/2013/04/12/targeted-killing-detainee-and-torture-why-language-choice-matters/>.

³⁵ Chris Woods, *Get the Data: Obama’s Terror Drones*, THE BUREAU OF INVESTIGATIVE JOURNALISM (Feb. 4, 2012), <http://www.thebureauinvestigates.com/2012/02/04/get-the-data-obamas-terror-drones/>. See also *Twenty Die in Double Drone Attack*, DAWN (July 7, 2012), <http://dawn.com/2012/07/07/twenty-die-in-double-drone-attack/>; Chris Woods, *CIA ‘Revives Attacks on Rescuers’ in Pakistan*, THE BUREAU OF INVESTIGATIVE JOURNALISM (June 4, 2012), <http://www.thebureauinvestigates.com/2012/06/04/cia-revives-attacks-on-rescuers-in-pakistan/>.

³⁶ Interview with Dawood Ishaq (anonymized name), in Islamabad, Pakistan (Mar. 8, 2012).

³⁷ Interview with Shams Mohiuddin (anonymized name and location), in Pakistan (May 2012).

³⁸ Jack Serle, *UN Expert Labels CIA Tactic Exposed by Bureau ‘a War Crime’*, THE BUREAU OF INVESTIGATIVE JOURNALISM (June 21, 2012), <http://www.thebureauinvestigates.com/2012/06/21/un-expert-labels-cia-tactic-exposed-by-bureau-a-war-crime/>.

Conclusion

In light of the findings of our report and the developments I have outlined here since its publication, we share the concerns conveyed in an April 11 letter by a coalition of human rights and civil rights organizations to President Obama, forwarded to this subcommittee.³⁹ We urge Congress, in particular the Committees and Subcommittees with jurisdiction over the Department of Justice, to call on the administration to “publicly disclose key targeted killing standards and criteria; ensure that U.S. lethal force operations abroad comply with international law; enable meaningful congressional oversight and judicial review; and ensure effective investigations, tracking and response to civilian harm.”⁴⁰

We further encourage this committee not to limit itself to issues of transparency and accountability, but rather to ensure that the hearings re-evaluate current targeted killing practices in their entirety, taking into account all available evidence, the concerns of all relevant stakeholders, domestic and international law, as well as short and long-term costs and benefits. A significant rethinking of current US targeted killing and drone strike policies is long overdue. US policy-makers, and the American public, cannot continue to ignore evidence of the civilian harm and counter-productive impacts of US targeted killings and drone strikes in Pakistan.

My sincere appreciation to Senator Durbin and the members of the Subcommittee.

³⁹ Scott Shane, *Rights Groups, in letter to Obama, Question Legality and Secrecy of Drone Killings*, N. Y. TIMES (April 12, 2013), <http://www.nytimes.com/2013/04/13/us/politics/rights-groups-question-legality-of-targeted-killing.html?pagewanted=all>; Open letter to President Obama, *Statement of Shared Concerns Regarding US Drone Strikes and Targeted Killings* (April 11, 2013), <http://www.nytimes.com/interactive/2013/04/13/us/politics/rights-groups-share-concerns-over-drones.html?ref=politics>.

⁴⁰ *Id.*



COLUMBIA LAW SCHOOL

HUMAN RIGHTS CLINIC

WRITTEN STATEMENT OF
THE COLUMBIA LAW SCHOOL
HUMAN RIGHTS CLINIC

For a Hearing on

“Drone Wars: The Constitutional and Counterterrorism Implications of Targeted Killing”

Submitted to the Senate Judiciary Committee

April 23, 2013

Human Rights Clinic, Columbia University School of Law
Naureen Shah, Acting Director

The Human Rights Clinic at Columbia Law School submits this statement to the Senate Judiciary Committee on the occasion of its hearing addressing “Drone Wars: The Constitutional and Counterterrorism Implications of Targeted Killing.” The Clinic has produced three major studies on the legality of drone strikes and their effect on civilians.¹

Drone technology provides powerful temptation to go to war. As the U.S. government increasingly uses drone technology outside of traditional armed conflict theaters, it sets dangerous precedents: that the government may kill secretly and refuse to answer credible concerns; and that using lethal force is the American norm and standard, despite the costs to U.S. legitimacy and local populations. Serious evaluation of these precedents is necessary. We recommend that Congress actively question claims about the effectiveness and precision of drone strikes, and engage in robust debate about proposals to expand lethal drone operations to new geographic locations and against new groups.

I. Congress Should Actively Question Assertions of Drone Strikes’ Success

The public and policymakers are in the dark about the extent of lethal drone operations outside of Afghanistan, their strategic impact and their effect on local populations. Basic information, such as the government’s legal standard for who may be lethally targeted and its assessment of the number and identity of individuals killed, is not available to the public.

Some congressional committees receive information about drone strikes from the CIA and Department of Defense’s Joint Special Operation Command (JSOC), but they are at risk of conducting oversight in an echo chamber: the CIA and JSOC are empowered to act with great secrecy because they conduct strikes that are effective and precise at unprecedented levels; Congress then asks the CIA and JSOC to report on the strikes, and these organizations oblige by reporting that their strikes were, indeed, effective and precise at unprecedented levels.

Recent reporting by McClatchy Newspapers suggests the folly of taking such assurances of effectiveness and precision at face value. It suggests two layers of obfuscation: U.S. intelligence reports may understate the true number of civilian deaths, and U.S. officials may understate the numbers even further. According to McClatchy, U.S. intelligence reports from the period of January 2010 to September 2011 described a single civilian casualty.² However, media reported significantly more civilian casualties during that period. A ground investigation by the UK’s Bureau of Investigative Journalism found that, within the period the intelligence reports covered, there were at least 45 civilians killed in 10 strikes.³ In particular, a March 17, 2011 strike killed

¹ Our reports *Counting Drone Strike Deaths* (October 2012), *The Civilian Impact of Drones: Unexamined Costs, Unanswered Questions* (September 2012) (with the Center for Civilians in Conflict), and *Targeting Operations with Drone Technology: Humanitarian Law Implications* (March 2011) are available at <http://web.law.columbia.edu/human-rights-institute/counterterrorism/drone-strikes>.

² Jonathan S. Landay, “Obama’s drone war kills ‘others,’ not just al Qaeda leaders,” McClatchy Newspapers, April 9, 2013, <http://www.mcclatchydc.com/2013/04/09/188062/obamas-drone-war-kills-others.html>.

³ See Chris Woods & Rahimullah Yusufzai, “Get the data: Twenty-five deadly strikes,” Bureau of Investigative Journalism, July 18, 2011, <http://www.thebureauinvestigates.com/2011/07/18/get-the-data-twenty-five-deadly-strikes/>.

more than a dozen civilians—tribal elders and local policemen who, along with some Taliban members, gathered for a tribal meeting to resolve a local mining dispute.⁴

Reports of civilian casualties from the March 2011 strike were significant enough to gravely undermine U.S.-Pakistani relations. Nevertheless, the U.S. intelligence reports appear not to reflect these civilian casualties. (The intelligence reports are not public, but according to McClatchy they described only one civilian casualty during the period). This is cause for concern: if official government assessments do not reflect claims of civilian casualties that effect foreign relations, they may be far too incomplete a basis for oversight. Worse, during the period the intelligence reports covered, U.S. officials claimed flatly and publicly that there had been no civilian casualties whatsoever.⁵

To date, although U.S. officials have acknowledged civilian casualties as “exceedingly rare,” they have not responded to credible reports and inquiries by journalists and non-governmental organizations about the effect of drone strikes on local populations.⁶ To the contrary, in some cases they have asserted in anonymous leaks that individuals documenting civilian deaths are complicit in an effort to “help Al Qaeda succeed” or that they “unwittingly draw on false propaganda claims by militants.”⁷

The larger problem is that reliance on the government’s assertions of low civilian casualties may skew policymakers’ and the public’s evaluation of whether drone strikes, and U.S. lethal force generally, are truly effective at stemming credible threats to U.S. security. As assertions of low civilian casualties are assimilated into fact, they threaten to provide a dangerous assurance: that the human toll is something we have identified, debated and considered. If we believe we know who and how many people we have killed, calls to examine and deliberate on drone strikes—and calls to end them—lose their urgency. We may come to falsely believe that drone strikes are an “open secret” when in fact, basic and important information about drone strikes remains secret and unavailable to the public. Moreover, low estimates of civilian casualties may distort our perceptions of the effectiveness of strikes and provide false justification for expanding drone strikes to new locations, and against new groups.

⁴ See Chris Woods, “US claims of ‘no civilian deaths’ are untrue, July 18, 2011, <http://www.thebureauinvestigates.com/2011/07/18/washingtons-untrue-claims-no-civilian-deaths-in-pakistan-drone-strikes/>.

⁵ John Brennan, director of the CIA and then-senior counterterrorism adviser, publicly claimed, “there hasn’t been a single collateral death” from U.S. strikes. See Scott Shane, “C.I.A. is Disputed on Civilian Toll in Drone Strikes,” N.Y. Times, August 11, 2011. Likewise, an anonymous U.S. official told CNN that there was “no evidence to support the claim [of civilian casualties] whatsoever” in responding to a report about the March 17, 2011 strike. Nick Paton Walsh & Nasir Habib, “Source: U.S. departs Pakistan base,” CNN.com, April 22, 2011.

⁶ See John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, *The Ethics and Efficacy of the President’s Counterterrorism Strategy* (April 30, 2012), available at <http://www.wilsoncenter.org/event/the-ethics-and-ethics-us-counterterrorism-strategy>.

⁷ In February 2012, unnamed officials responded to a report of CIA strikes targeting funeral-goers and other civilians by stating: “One must wonder why an effort that has so carefully gone after terrorists who plot to kill civilians has been subjected to so much misinformation. Let’s be under no illusions—there are a number of elements who would like nothing more than to malign these efforts and help Al Qaeda succeed.” Scott Shane, “U.S. Said to Target Rescuers at Drone Strikes Sites,” N.Y. Times, February 5, 2012. More explicitly, in May 2012, the New York Times reported an unnamed senior official as stating that reports of civilian deaths “unwittingly draw on false propaganda claims by militants.” Jo Becker & Scott Shane, “Secret ‘Kill List’ Proves a Test of Obama’s Principles and Will,” N.Y. Times, May 29, 2012.

In other conflict settings, such as Afghanistan, U.S. officials have provided greater information about civilian deaths and the effect of operations, without compromising U.S. security.⁸ What differentiates this setting is the claim that drone operations must be kept secret so they can continue. For instance, supporters of secrecy claims that if more information about drone strikes was public, the Pakistani government would face opposition from its citizens and cease acquiescing to U.S. strikes. Thus, at least in public, U.S. officials have refused to provide assessments of drone strikes that go beyond generalized assertions of achievement. This position forecloses informed debate by U.S. policymakers and the public, and directly conflicts with our democratic system of government that is based on public consent. Moreover, this position plays to the interests of foreign governments seeking to avoid accountability to their own citizens, further compromising U.S. democratic values.

II. Congress Should Robustly Debate the Expansion of Drone Strikes

The use of drones outside of traditional combat zones has had the consequence of reducing public debate about whether it is wise, lawful and humane to use lethal force to counter emerging threats to U.S. security. Congress should counteract this trend by robustly debating expansion of drone strikes to new locations and against new groups, and it should assess whether non-lethal alternatives would better serve the stability of regions where strikes are contemplated, the welfare of local populations, and U.S. long-term interests.

It is all too tempting to expand drone strikes without such debate and assessment. Compared to media coverage of wars in Afghanistan and Iraq at their height—with disturbing photos of both torture and ill-treatment at Abu Ghraib and the returning coffins of U.S. servicemen and women—the coverage of drone strikes ordinarily carries no images that would make concrete the human toll of strikes. To the contrary, as many observers have noted, media coverage in the United States of drone strikes frames the impact on in sanitized terms—militants, compounds, convoys—with only the accompanying image of a Predator or Reaper on the tarmac. The American public has no visual cues about the short or long-term impact of drone operations.

Moreover, while drone strikes are frequently in the news, the light footprint of drone technology enables the government to escape public scrutiny over its decisions to expand counterterrorism operations across the globe. Deploying U.S. troops to another combat zone would trigger the public's concern about another costly and long war, and might prompt U.S. officials to publicly and clearly explain why force is justified, while "floating a drone casually and quietly over a boarder, might go under the radar screen both literally and metaphorically," as one expert notes.⁹ Indeed, as the government has continued to expand drone operations beyond Pakistan, to Yemen and Somalia, it has not faced public demands to justify these decisions or calibrate the expansion to appease public concerns.

⁸ See Columbia Human Rights Clinic & Center for Civilians in Conflict, *The Civilian Impact of Drones: Unexamined Costs, Unanswered Questions* at 44-45.

⁹ See Philip Alston, *The CIA and Targeted Killings Beyond Borders*, 2 Harvard National Security Journal 283, 326 (2011), <http://harvardnsj.org/2012/01/the-cia-and-targeted-killings-beyond-borders/>.

Among policymakers, drones enjoy support as an attractive alternative to counterinsurgency strategies that cost significant U.S. blood and treasure in Iraq and Afghanistan. As the Administration seeks to counter a growing number of groups it believes to be Al Qaeda affiliates, in a growing number of places around the globe, drone strikes appear to be an alternative to adding multiple new land-war fronts in the Middle East and Africa. Policymakers appear comfortable that with “surgical” drone strikes, the CIA and JSOC will disrupt militant groups and prevent terrorist plots, favoring this strategy over alternative means to establishing security or setting conditions for peace. Lethal targeting and drone strikes are increasingly held up as the norm and standard for justice.

Approaches to counterterrorism that yield less concrete and identifiable gains—such as diplomacy, prevention of “radicalization,” intelligence gathering and detention—are losing salience. The easy metrics of drone strikes’ touted benefits—killing high-level Al Qaeda leaders—may obscure their less measurable yet grave costs:

1. *Inherent Threat to Life:* Drone strikes are inherently more threatening to civilian life than alternative, non-lethal approaches. By virtue of the remote control technology involved and the circumstance of limited or no supporting boots on the ground, drone strikes deny targeted individuals the chance to surrender. While interrogation and detention, as recent history shows all too well, carry their own risks of human rights abuses, these non-lethal approaches at least provide the opportunity for an assessment of whether targeted individuals in fact pose a threat to U.S. interests—an opportunity taken off the table by drone strikes.
2. *Political Effects:* Drone strikes undermine the legitimacy of fragile governments in the countries where they occur, as we have seen in the cases of Pakistan and Yemen.¹⁰ In Pakistan, drone strikes contribute to a crisis of confidence in a civilian government that, to its own citizens, appears powerless to stop U.S. drone strikes or assert Pakistani interests. Strikes have arguably pushed militant groups from the northwest region of the country to major Pakistani cities, where they have conducted frequent and devastating terrorist attacks, further undermining the Pakistani government’s legitimacy and the stability of the country.¹¹ These results are inimical to U.S. long-term interests for the region.
3. *Increasing Violence & Threats to Local Populations:* Drone strikes can contribute to patterns of violence and the terrorizing of local civilian populations. In Pakistan, militant groups have pursued retaliatory attacks against local civilians they suspect of being U.S. informants, including torture and killings. The frequency of drone strikes can push militant groups to move to new areas and communities, which are then filled with guns, munitions and fighters, leading the

¹⁰ See Michael J. Boyle, “The costs and consequences of drone warfare,” *International Affairs* (2013), http://www.chathamhouse.org/sites/default/files/public/International%20Affairs/2013/89_1/89_1Boyle.pdf.

¹¹ See Rafia Zakaria, “President Obama: The drones don’t work, they just make it worse,” *Al Jazeera*, March 26, 2013, <http://www.aljazeera.com/indepth/opinion/2013/03/201332685936147309.html>.

local civilian population at greater risk of being caught up in future drone strikes or violence by militant groups.¹²

4. *Legitimacy as World Leader:* Drone strikes have serious ramifications for U.S. leadership. U.S. claims of expansive legal authority to conduct strikes do not enjoy support in the international community. Expansion of drone strikes to new areas will bring added scrutiny and criticism of U.S. legal claims, and undermine the U.S. government's ability to argue that other governments should be restrained in their use of force.
5. *Turning public opinion against the United States:* Many commentators have compared drone strikes to the detention and torture scandals of recent years, in terms of providing fodder for narratives that characterize the United States as abusive and tyrannical. While local political dynamics should be not be oversimplified, increasing conflict-related violence can be expected to polarize public opinion.

III. Conclusion & Recommendations

Drone strikes, as a use of lethal force, should be the exception rather than the rule outside of traditional armed conflict theaters. Congress has a crucial role to play in ensuring drone strikes do not create a precedent for increasingly secretive and permissive killing practices. We urge the Committee and other members of Congress to:

- Seek official government counts of the number of individuals killed and their identities, and make these publicly available as soon as practicable;
- Encourage the Department of Defense and the CIA to establish or implement processes for declassifying information about lethal drone operations, once they are completed;
- Seek information about the impact of covert drone strikes from sources outside of government, including journalists and civil society based in countries where strikes occur; and
- Investigate credible reports of civilian casualties by journalists and human rights groups

¹² See Columbia Human Rights Clinic & Center for Civilians in Conflict, *Civilian Impact of Drones* at 21-24.

The Constitutional and Counterterrorism Implications of Targeted Killing

Written Testimony Submitted to the Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights

April 30, 2013

Sarah Holewinski

Executive Director, Center for Civilians in Conflict

Chairman Durbin, Ranking Member Cruz, members and staff of the subcommittee, thank you for the opportunity to provide written testimony for this opening dialogue on US policy and drone use.

I am executive director of the Center for Civilians in Conflict, an organization that advocates with warring parties for the protection and recognition of civilians harmed in armed conflict. We have worked with militaries around the world for nearly a decade on more compassionate, smarter policies and operational tactics to minimize civilian suffering.

This testimony is intended to highlight the civilian protection limitations of remotely operated drone strikes. We do not have a problem with unmanned aerial vehicles as a new technology, nor as a technology used in a full-scale military operation assuming proper civilian protection protocols and responses to civilian harm are implemented. Drones are not inherently indiscriminate or unethical. Rather, it is the way that drones are currently being used by the United States in remote areas outside widely recognized conflict zones that creates the potential for unrecognized civilian harm.

Despite recent attempts by the Obama Administration to be more transparent about these drone operations, significant questions remain, including: What civilian protection protocols are in place? How are drone operators trained on distinction? How is a civilian defined? How is civilian harm assessed post-strike? So far, the answer to all of these questions has been "just trust us." This is not an appropriate policy for a nation that prides itself on transparency and the just use of force.

In my testimony, I first outline the categories of drone strikes and what they mean for avoiding civilians. Second, I discuss the difficulty in truly determining whether drone strikes actually reduce civilian harm in remote areas, as the White House holds they do. Third, I examine myths that obscure the impact of covert drone operations on civilians. Finally, I offer recommendations to bring policy in line with the ethical and strategic imperative of avoiding civilians and addressing civilian harm in any lethal use of force.

Personality and Signature Strikes, and the Definition of a Civilian

The two categories of drone strikes used by the United States—"personality strikes" and "signature strikes"—have opaque parameters and are thus a risk to civilian lives. Personality strikes, or strikes in which the target's name, face, and history are known, have been used in military operations for centuries. In other words, these strikes are not unique to drone warfare. When personality strikes, however, take place in remote areas without boots on the ground, targeting may be relying on low quality intelligence or only video feed, if not with regard to the target (who may be easily identifiable and well known) then for the people surrounding that target. These people may or may not be civilians.

Signature strikes that target individuals based on a set of pre-determined behaviors, rather than known identity, have also been used in traditional combat situations. However, their use as a way to identify targets for drone strikes in remote regions—particularly Yemen—has increased in recent years and brings even more significant challenges to civilian protection. The United States

does not disclose what behaviors justify a signature strike. There are legal issues involved in this opacity that I presume my colleagues in our human rights community will address with aplomb. My concern is a pragmatic one: Civilians unknowingly—or worse, mistakenly believed to be—engaging in this behavior can be targeted.

For civilians living under drones in, for example, Pakistan, life or death comes down to the visceral question: what behavior will get me or my family killed? A shopkeeper in Waziristan has no obvious way of knowing that offering a ride to a customer, who turns out to be a low-ranking militant, may mark the shopkeeper as a target. Men with weapons riding in convoys might be shepherds on their way to the market, or they might be preparing for an ambush.

In an interview with the Columbia Human Rights Clinic last year, former intelligence analyst Marc Garlasco noted how difficult it was to develop “signatures” in Iraq where American forces had a military presence on the ground. He argued that in areas with even fewer legitimate sources of intelligence—like within the tribal belt of Pakistan or Yemen—it is unlikely that the United States could develop strong signatures. This makes sense. Many Pakistani men carry guns in their daily lives, though they have nothing to do with al Qaeda. The same is true in Yemen. As a Yemeni official last year said, “Every Yemeni is armed... so how can they differentiate between suspected militants and armed Yemenis?”¹

We have been assured in both public statements and private conversations with military officials that the United States has careful vetting processes to ensure this erroneous targeting doesn’t happen. However, there is no evidence to back up those assertions, either to the public or the public’s Congress.

Determining Civilian Harm

The real impact of remote drone strikes on civilian populations is unknown, including by the Obama Administration. Yet a reduced risk for civilian harm is frequently heard as an argument for using drones instead of other weapons platforms. The reality is that there are considerable impediments to knowing who has been harmed and how, which calls into question most official estimates of casualties and obscures the true civilian cost of this particular counterterrorism campaign.

Consider that if these drone strikes are indeed being conducted under International Humanitarian Law, as is stated policy by the Obama Administration, then not being able to assess whether a strike was proportionate to the military target and whether it distinguished between civilians and combats becomes a legal question of adherence to international law. Aside from legal arguments, there is also a strategic pitfall for the US counterterrorism mission to not understanding the negative impact of these strikes on the population. The cost may be not only to civilian lives but also to America’s reputation.

Most drone strikes occur in areas largely inaccessible to independent external actors. Be it a personality or a signature strike, the lack of conventional U.S. forces on the ground to conduct investigations means there is little way of corroborating evidence that the strike has succeeded in avoiding civilians. Video surveillance cannot talk to witnesses or dig in the dirt for forensic evidence. A homebound sick child is unlikely to be noted by surveillance conducted prior to a strike, and may again be overlooked as the drone counts the bodies recovered from the rubble from thousands of feet above. Further, civilians have no way of notifying officials of what happened to them and their families; there are no US bases to travel to and no court to file claims.

Several organizations have investigated incidents of civilian harm in Pakistan or aggregated media reports of strikes to estimate numbers of civilian casualties, however access remains a challenge for these groups as well. Their estimates vary on the total figures of civilian deaths, though they consistently suggest significantly higher civilian casualties than those provided by U.S. government statements of “extremely low” and some years “in the single digits.”

When U.S. officials provide data, they're often so confusing as to defy credibility. In early 2011, the government estimated that drone strikes had caused 30 civilian casualties to date.¹ In June 2011, then-counterterrorism adviser John Brennan asserted, "there hasn't been a single collateral death because of the exceptional proficiency [and] precision of the capabilities we've been able to develop."² A statement made by a former senior legal adviser to the U.S. Army Special Forces worryingly refutes that assertion: "...based on my military experience, there's simply no way so few civilians have been killed. For one bad guy you kill, you'd expect 1.5 civilian deaths because no matter how good the technology, killing from that high above, there's always the 'oops' factor."³

Civilian casualty statistics will vary depending on the definition used of a "civilian" (as opposed to a targetable individual often dubbed a "militant" by US officials). This term is easily manipulated or unintentionally excludes people who should be considered un-targetable civilians. While media reports routinely cite unnamed Pakistani government officials as confirming the identity of the individuals killed as "militants," such information is rarely corroborated. A civilian killed in a strike targeting a group of "militants" may wrongly be counted as a militant himself; there is nobody to refute this categorization. In signature strikes, the identity of the dead was unlikely to have been known in the first place, and therefore it is more likely that civilians can be misidentified as combatants. Former senior Obama Administration official John Boyle noted in a recent Chatham House study that the Administration has been "very successful in spinning the number of civilian casualties" with government numbers based on "highly selective and partial reading of the evidence."⁴

The Negative Impact of Remote Drones on Civilians

While the exact number of civilian casualties caused by remote drone strikes is unknown, there is strong anecdotal evidence to suggest that there are significant negative ramifications of these strikes on the civilian population. This is not to say that remote drone strikes cause more harm than would a full-scale military operation with boots on the ground. Rather, we note the impact on civilians here to combat the predominant view among US policymakers and the American public that drone strikes are a virtual panacea to civilian suffering in conflict.

Leaving aside the contentious debate regarding militant-versus-civilian deaths, it is important to remember that one incidental, "oops" factor casualty can dramatically alter families' lives. In Pakistan, families are often large, and their well-being is intricately connected among many members. Particularly if the family's breadwinner is killed, the death of one member can create long-lasting instability. In regions most often targeted by drones, women often have a limited earning capacity, and savings and insurance are not common, which leaves widows and orphans extremely vulnerable. Sons may drop out of school to provide for their family, and daughters may forgo education to become caretakers.⁵ These second and third-order effects are all too often underestimated or ignored in favor of praise for the drone program's apparent efficiency and precision.

Displacement is also rampant in areas under US drone operations. In northwest Pakistan, homes are often shared by multiple families, compounding the suffering and hardship caused when a house is destroyed.⁶ We interviewed a man named Usman Wazir who was made homeless when a drone destroyed his home, killing his brother, his wife, and their two teenage children. Shakeel Khan and his elderly parents survived a drone attack on their home, which killed his brother and his brother's wife and children. Khan told us that he is struggling to support himself and his parents, adding: "We don't have enough to reconstruct our house and fear that the drones

¹ Compare David S. Cloud, "UN Report Faults Prolific Use of Drone Strikes by US," *Los Angeles Times*, June 3, 2010, suggesting fewer than 50 civilians have been killed in strikes since the summer of 2008; with Ken Dilanian, "C.I.A. Drones May Be Avoiding Pakistani Civilians," *The Los Angeles Times*, February 22, 2011, reporting, a few months later, that only 30 civilians had been killed in strikes since June 2008.

² See Scott Shane, "C.I.A. Is Disputed on Civilian Toll in Drone Strikes," *The New York Times*, August 11, 2011.

³ Adam Entous, "Special Report: How the White House Learned To Love the Drone," *Reuters*, May 18, 2010.

⁴ Michael Boyle, "The case against drones," Chatham House, International Affairs, January 2013.

⁵ Center for Civilians in Conflict, "Civilian Harm and Conflict in Northwest Pakistan" (2010) at 26.

⁶ <http://civiliansinconflict.org/resources/pub/civilian-harm-and-conflict-in-northwest-pakistan>.

⁷ Center interview with Pakistani civilian (name withheld), interview no. 34, Northwest Pakistan, 2010.

will strike us again.”⁷ Daud Khan and his surviving family were forced to move from their village in Waziristan when they could not afford to rebuild their home destroyed in a drone strike.⁸

Drone strikes have also hit many homes in Yemen, contributing to the displacement of over 100,000 people.⁹ In southern Yemen, an air strike in the town of Jaar reduced an entire block to rubble in two successive explosions.¹⁰ Lisa Schirch of 3P Human Security explains property loss and displacement because of drone strikes in this way: “drone-related displacement disrupts long-term stability by decreasing the capacity of local people to respond through civil society initiatives that foster stability, democracy and moderation and increase displaced people’s vulnerability to insurgent recruitment.”¹¹

Psychological trauma is a negative ramification of drone strikes that is hard to measure and will be an insidious burden on civilian populations for years to come, even after drones strikes end. In northern Pakistan, where drones are overhead 24 hours a day, civilians live in constant fear of being struck.¹² Michael Kugelman of the Woodrow Wilson International Center for Scholars noted: “I have heard Pakistanis speak about children in the tribal areas who become hysterical when they hear the characteristic buzz of a drone. [...] Imagine the effect this has on psyches, and particularly on young ones already scarred by war and displacement.”¹³ The fear associated with covert drone strikes can truly affect an entire community.

As one victim told Center for Civilians in Conflict:

“We fear that the drones will strike us again... my aged parents are often in a state of fear. We are depressed, anxious, and constantly remembering our deceased family members...it often compels me to leave this place.”¹⁴

Another man described the anguish of his sister-in-law, who lost her husband and two sons in a U.S. drone strike in Pakistan:

“After their death she is mentally upset...she is always screaming and shouting at night and demanding me to take her to their graves.”¹⁵

With U.S. targeting criteria classified, civilians in Pakistan, Yemen, and Somalia do not know when, where, or against whom a drone will strike. The opaque nature of these criteria, particularly with regard to signature strikes, substantially compounds the constant fear that a family member will be unexpectedly and suddenly killed. Additionally, civilian victims of drone strikes may be assumed to be connected to militancy by their community because of drones’ fabled precision. Victims face the double burden of dealing with a physical attack and a societal stigma.¹⁶

The Myths of Drones

American policymakers note the drone’s precision as a revolutionary leap forward in the conduct of warfare. I take issue with this assumption, and note that it has significant policy implications. If a drone strike is considered to cause such minimal civilian harm, the US is unlikely to prioritize policies that properly respond to civilian casualties. In fact, this appears to be the case in reality. Civilians harmed by drone strikes are left to fend for themselves, their communities

⁷ “Civilian Harm and Conflict in Northwest Pakistan,” at 60–62.

⁸ *Ibid.*.

⁹ “Yemen: tens of thousands in Abyan in need of urgent help,” International Committee of the Red Cross, June 6, 2012, noting that “fierce fighting, sometimes involving air strikes, has led to a severe deterioration of the humanitarian situation” in parts of southern Yemen; “Briefing Notes: Internal displacement grows in Yemen,” Office of the UN High Commissioner for Refugees, March 9, 2012, estimating 150,000 internally displaced people in the south.

¹⁰ Kelly McEvers, “Yemen Airstrikes Punish Militants, and Civilians,” NPR, July 6, 2012.

¹¹ Lisa Schirch, “9 Costs of Drone Strikes,” Huffington Post, June 28, 2012.

¹² Center interview with Pakistani civilian (name withheld), interview no. 59, Northwest Pakistan, 2010; Jane Perlez and Pir Zubair Shah,

“Drones Batter Al Qaeda and Its Allies Within Pakistan,” The New York Times, April 4, 2010.

¹³ Michael Kugelman, “In Pakistan, Death Is Only One of the Civilian Costs of Drone Strikes,” Huffington Post, May 2, 2012.

¹⁴ Center interview with Pakistani civilian (name withheld), interview no. 62, Northwest Pakistan, 2010.

¹⁵ “Civilian Harm and Conflict in Northwest Pakistan,” at 27.

¹⁶ Center interview with Pakistani civilian (name withheld), interview no. 20, Northwest Pakistan, 2010.

angered by the lack of recognition, and yet continually told that drones are so precise that they minimize suffering.

Official US statements that drone “precision” is distinct in the history of warfare because drones hit their targets and avoid civilians better than other technologies belies the actual definition of “precision.” Rather, “precision” means that a particular weapon will go where the pilot or operator tells it to go—an ability that is decidedly not unique to drones. In fact, a fighter jet carrying the same missile or bomb as a drone can be just as precise. Precision is based less on the actual weapon, and more on knowing who the target is, knowing who is a civilian, and knowing if there are civilians in the strike area. Errors in intelligence, limitations of video surveillance, and a lack of human intelligence from the ground are all factors that can lead a drone to be just risky for civilians as another weapon with the same bad inputs. If the target isn’t the right target, the drone will indeed strike him—but what good does “precision” do in this case?

Though drones do provide unparalleled surveillance capabilities and can fly lower and slower than, for example, a fighter jet, civilians remain at risk if the intelligence feeding into the targeting analysis is faulty. This can occur if a drone’s video intelligence is corroborated by an untrained, paid local informant rather than a US service member on the ground (as would be the case in a full scale military operation like that of Afghanistan), or if the intelligence being offered from locals is marred by tribal vendettas. Remote operation also risks the “soda straw” effect, in which a drone operator may zoom in on a target but lose a wider picture of the area—like viewing a small amount of liquid through a soda straw. Thus, a civilian may move into the vicinity of the strike without being noticed or considered as part of a targeting analysis. Post-strike, there is nobody to note the civilian’s death, record it, or use the lesson learned for improving future operations.

One pilot described this effect when targeting a truck in Afghanistan. Viewed through Predator footage, the truck appeared to be far enough away from surrounding houses and pedestrians for a strike to be approved. The ground commander, who was also monitoring the Predator footage, gave clearance to take the shot. After the missile had been fired, two young boys unexpectedly appeared on the operator’s screen riding a bicycle. The pilot described his horror as he could do nothing but wait and watch as the missile killed the two boys along with the occupants of the truck.¹⁷ With a wider field of view and ground intelligence, the two boys may have been identified in time.

When drone strikes do harm civilians, US policies have failed to provide appropriate channels of accountability. Civilians suffering losses from US combat operations in Afghanistan are eligible for amends in the form of monetary payments or “solatia.” This is an ad hoc tradition for the US military in Vietnam, Korea, and Iraq as well. A civilian suffering losses from a remote drone strike is likely to receive only a denial that his or her harm ever occurred, or the explanation that their family member had something to do with a terrorist group. This response to civilian harm is antithetical to stated US values of regretting every civilian loss as a result of American operations. Even John Brennan recently said in Senate testimony during his confirmation hearing: “Where possible, . . . and, if appropriate, [the US] should provide condolence payments to families of those killed.”¹⁸

Policy Recommendations¹⁹

Instead of holding onto assumptions regarding precision, effectiveness, and low levels of civilian harm, US policymakers should create counterterrorism policy in full awareness of their unintended, negative consequences and then decide if drones are the proper weapon to rely on in countering terrorism. This will require an honest assessment of the remote drone program and

¹⁷ See Matt J. Martin and Charles W. Sasser, *Predator: The Remote-Control Air War over Iraq and Afghanistan: A Pilot’s Story* (Minneapolis: Zenith Press, 2010), 211–212.

¹⁸ Responses to Posthearing Questions, Mr. John Brennan, US Senate Intelligence Committee, February 2013, <http://www.intelligence.senate.gov/130207/posthearing.pdf>

¹⁹ Detailed recommendations on the drone program can be found at Center for Civilians in Conflict and Columbia Law School, *The Civilian Impact of Drones: Unexamined Costs, Unanswered Questions* (2012), <http://civiliansinconflict.org/resources/pub/the-civilian-impact-of-drones>

far more information than is currently available on how drone strikes impact the local civilian population. Three broad policy recommendations logically follow:

1. Increase Transparency

Only a few outside a tight circle of policymakers know who is targeted, why, how and what measures are put in place to protect civilians. Naturally, some secrecy is necessary; however, the details we seek would surely not put America's security at risk. It is necessary to openly address:

- How are civilians and civilian casualties defined?
- How are civilian casualties assessed?
- What is the definition of a targetable individual?
- Are drone operators trained in civilian protection and how?
- How can civilians protect themselves from behavior-based targeting?

The conventional U.S. military has become relatively open about each of these protocols in other circumstances. There is no reason drone operations should be any different.

2. House the Drone Program under the Defense Department to Enhance Transparency and Civilian Protection

Administration officials have repeatedly offered assurances that the Central Intelligence Agency—the lead on many remote drone operations—complies with international law and does it utmost to avoid civilian casualties, yet there is no evidence to suggest this is the case. Moreover, the CIA lacks an institutional history of openly adhering to international, or even American, norms and values in using lethal force. Perhaps more disturbingly, joint CIA-JSOC drone operations may not be considered “traditional military activities” despite use of lethal use of force by the US government, which means Army, Navy and Marine directives on civilian protection or law of war compliance may not cover them.²⁰

America's armed services have a transparent chain of command, are trained in civilian protection practices, and study lessons-learned. It will not be enough, however, to transfer all remote drone operations under military command. JSOC—the agency likely to lead those operations—is currently free from public scrutiny. Congress will need to ensure the Pentagon increases JSOC's accountability and that military directives on civilian protection are enforced.

3. Recognize Civilian Harm

United States policy must recognize the actual harm drone strikes cause to civilians. As far as my organization knows, no victim of the remote drone campaign has received apologies, an explanation for their losses, or amends from the US government. As recently as 2011, the United States refused to admit drone strikes were happening at all, leaving victims with denials rather than help. Our research further shows that most conflict victims in the world, and indeed in Pakistan, want an explanation of why they were harmed and recognition of their losses. Acknowledgement and explanations can answer unanswered questions, dignify loss and, in cases where the explanation is public, can remove local suspicion of families victimized by a strike. Non-legal monetary payments in cases of unintended or otherwise lawful civilian harm can prove that a family was not the intended target and help them begin to recover, though no amount of aid will ever replace their loss.

²⁰ See “Directive 2311.01E: DoD Law of War Program,” Department of Defense, May 9, 2006, §4.1, <http://www.dtic.mil/whs/directives/corresp/pdf/231101e.pdf>. CIA operates under Title 50 “covert action” of US law allowing for deniability of U.S. role, whereas JSOC falls under Title 10 “armed forces” is technically guided by military doctrine and its’ actions can be acknowledged by the U.S. government. But in joint CIA and JSOC activities those actions can be blurred and may be considered covert under Title 50.

The lack of US troops on the ground in areas of drone strikes does not absolve the United States from responsibility to investigate incidents of civilian harm and, where appropriate, to recognize and assist victims. The United States could initiate a claims process similar to that used by the US military in other areas of kinetic action by working in concert with personnel on the ground, either through USAID programs or, in some cases, through connections to the local government.

Avoiding and addressing civilian harm caused by US drone strikes requires a more robust and open dialogue about how drones are being used and their impact on the civilians living under them. May this be the first of more inquiries to come.

Thank you again for your consideration of these issues and your leadership.

12 April 2013

To: Chairman Richard Durbin and the Senate Judiciary Subcommittee on the Constitution, Civil Rights and Human Rights

From: Leah Bolger, CDR, USN (Ret)

Subject: Written Testimony Regarding the Hearing on "Drone Wars: The Constitutional and Counterterrorism Implications of Targeted Killing"

1. I am submitting this written testimony in response to an invitation received by e-mail for public testimony.
2. I was part of a 31 person delegation which traveled to Pakistan in October 2012 to meet first-hand with the victims of U.S. combat drone strikes. Our delegation was sponsored by the Pakistani organization "Foundation for Fundamental Rights," which is a group of lawyers who advocate on behalf of Pakistani drone victims.
3. While in Pakistan we met with some of the same victims who were interviewed for the comprehensive report "Living Under Drones" (www.livingunderdrones.org) authored by researchers at Stanford and NYU Universities. **I strongly urge this Senate Subcommittee to review this report.** The stories we heard from the victims are reiterated and reinforced in much more thorough detail in the Living Under Drones written report.
4. We also met with a good number of members of the general public who are overwhelmingly opposed to the drone attacks and are frustrated and angry with their own government whom they believe to be complicit in the drone killings. The Pakistani Foreign Minister said that drones were the reason that (according to a Pew poll) 75% of Pakistanis believe that the U.S. is an enemy.
5. The U.S. combat drone program is creating exponentially more enemies than it is killing. The Living Under Drones report believes that only 2% of those killed by combat drones are high-level combatants. Researchers believe that several thousand people have been killed including hundreds of women and children. We met with a photojournalist named Noor Behram who showed us the photos he had taken of hundreds of children killed by drones. He also believes that close to 200 women have been killed but their names are not released due to a strict privacy standard regarding women. The U.S.'s refusal to acknowledge these deaths and take responsibility for them is reprehensible and only fuels anti-American sentiment.
6. In addition to meeting with members of the general public and drone victims, we also met twice with the Acting Ambassador to Pakistan, Mr. Richard Hoagland. I was shocked by Ambassador Hoagland's indifference to what we had to say, and his lack of priority to this issue. He has not met with any of the victims, denied the veracity of our reports and photos, and refused to even read the Living Under Drones report. He told us that he had "other priorities." I would think that it is his job, as our country's most senior

representative, to be gravely concerned with a problem that has been identified as the host country as the reason 75% think of the U.S. as an enemy.

7. I was on active duty in the U.S. Navy for 20 years, and for two years was stationed at the U.S. embassy in Tunisia at the Office of Defense Cooperation. Additionally I served in Iceland, Bermuda and Japan, and though I was not a Foreign Service Officer, my experience working at the embassy, and in foreign countries has imbued in me a sensitivity to local cultures. We asked one of the victims, a gentleman named Kareem Khan whose son and brother were killed in a drone strike, if he had ever tried to talk to the embassy about what had happened. He said that no one in the embassy would talk with him, and added, "They don't think of us as humans."
8. The U.S. drone program in Pakistan is run by the CIA, which is an especially egregious violation of international law, and the U.S. Constitution. Numerous tenets of the Geneva Conventions are disregarded by the use of killer drones. Suspected "militants" are not given an opportunity to surrender, there is no evidence brought against them, and there is no escalation of force. The practice of "signature strikes" completely contradicts international laws, and even the U.S.'s stated rationale; that combat drones were for high-value combatants, who posed an imminent threat, and who we are unable to capture otherwise. The fact is, the U.S. has no idea who it is killing, and it doesn't seem to care. This is a very sad commentary on our foreign policy and our "values" as a democratic country.
9. I urge you and your committee to read the Living Under Drones report, investigate this program, and put an immediate hold on further combat drone attacks. The U.S. needs to abide by international law if we are ever to regain the moral highground.

Very Respectfully,

Leah Bolger, CDR, USN (Ret)

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STATEMENT OF

**RAND PAUL, M.D.
UNITED STATES SENATOR**

ON

**“DRONE WARS: THE CONSTITUTIONAL AND COUNTERTERRORISM
IMPLICATIONS OF TARGETED KILLING”**

BEFORE THE

**UNITED STATES SENATE COMMITTEE ON THE JUDICIARY, SUBCOMMITTEE
ON THE CONSTITUTION, CIVIL RIGHTS AND HUMAN RIGHTS**

APRIL 23, 2013

Chairman Durbin, Ranking Member Cruz, Members of the Subcommittee,

When I filibustered the nomination of John Brennan, I focused on whether the President has the authority to assassinate American citizens on American soil without trial or due process. My critics said I was being absurd because this had not happened yet. But that wasn't the point. The point was whether or not it could happen in the future. The point was whether or not the President, the Attorney General or the head of the CIA believed that the Federal Government had such power.

The point was about the proper role of the Federal Government. The point was whether the Constitution still mattered.

If the Fourth and Fifth Amendments do matter, there was only one possible answer to my question: 'No, the President cannot assassinate an American on American soil without due process.' Needless to say, it took me a long time to get that answer. Even during a 13-hour-filibuster, I was never certain I would get that answer.

Today, we are here not to condemn the use of drones in a general sense. Drone technology certainly has its merits and has been useful against our enemies. But the potential for the misuse of drones, or lack of foresight in using them as a general policy—at home or even on the battlefield against terror suspects—raises important constitutional and national security concerns.

We now know that the President has a kill list, which has already included American citizens, such as terror suspect Anwar al-Awlaki. But even overseas, even traitors deserve some due process if they are American citizens, particularly if they are not actively involved in combat. If he was actively engaged in combat against our soldiers, there would've been no question—you take him out. But he was riding in a vehicle nowhere near American troops when he was killed.

My preference would be that we try Americans accused of aiding and abetting terrorism as traitors. But if they don't return, or won't return, try them *in absentia*. The Constitution makes clear that treason is a federal crime.

We should also remember this was the same man who was invited to dine at the Pentagon just months after 9/11. Could the same people whose judgment we trusted to invite al-Awlaki to wine and dine in Washington, also be mistaken in their judgment in their decision to assassinate him? We will never know, because this American citizen never received any trial or due process.

This is not to say that drones should never be used, and they have been used sometimes to good effect. But some in the military community have argued that our current drone program actually makes the nation less safe and undermines our national security.

Kirk Lippold, Commander of the USS Cole, which as we all know, was attacked by al-Qaeda in 2000, said recently of our drone policy: "This president, in my opinion, has fundamentally undermined our ability to defend this nation by killing terrorists rather than capturing them and taking them to an intelligence facility like Guantanamo Bay and learning how these groups operate. And while the program appears on the face to have had great success, I think ultimately

the drone program is setting us up for failure because for each high-level terrorist you kill, that is a high-level intelligence asset that is no longer available to exploit.”

Are we making a major intelligence mistake in killing these terror suspects with drones before getting valuable intelligence? Remember, 9/11 itself was due in large part to massive intelligence failure.

We know that public opinion in Pakistan and elsewhere in that region has been very unfavorable toward our drone policies. An NYU-Stanford study last year determined that for every terror suspect we kill, that are an average of 50 civilian casualties. What will happen when our enemies eventually develop drone technology, which will probably be sooner than later? How will they use drones? What kind of precedent will the US have set with our own policies? Will every politician and general in America, at home or outside of it, become a target of terrorist’s drones?

On the battlefield drones are unquestionably an important tool when Congress has authorized the action. But they are a unique tool. They are a tool that enables the Executive to stretch the limits of Congress’ authorization of force.

That is even more true when targeting American citizens, and drone assassinations should not be used in lieu of due process. The Constitution already provides a guide for dealing with citizens suspected of collaborating with radical terrorists—try them for treason.

Domestically, drones open up endless possibilities for surveillance of Americans. We should use the Fourth Amendment as a guide to set limits on all government surveillance, including drones.

Drones are a tool that is allowing the Executive Branch to push the limits of what constitutes constitutionally proper policy. As drones become an ever-growing part of our counterterrorism strategy abroad, their technological capabilities to locate, identify, follow, and monitor advance as well—facial recognition, license plate readers, and infrared scanners. We already have drone manufacturers looking to expand their market by converting these technologies for domestic function and marketing them specifically to law enforcement—which can even be scooped up with federal grant money. And the whole cycle is driven, in part, by the growing use of drones as a counterterror tool. Making better, more efficient drones abroad will only make it harder to restrain drone surveillance at home.

These are tough issues and we should examine the role of drones, but also the underlying policy. The Constitution does not give the Executive Branch the right to exercise the use of this rapidly advancing new technology at will or whim.

Congress must be involved in the process.

Thank you.

Drone Wars: The Constitutional and Counterterrorism Implications of Targeted Killing
Hearing Before the Senate Judiciary Subcommittee on the
Constitution, Civil Rights, and Human Rights
April 23, 2013

Statement submitted by Sojourners

Chairman Durbin, Ranking Member Cruz, and Members of the Subcommittee. Thank you for holding this hearing on an important topic, and thank you for the opportunity to submit a statement.

Sojourners is a Christian organization whose mission is to articulate the biblical call to social justice. One of our core values is to work for life and peace. Because all life is a sacred gift from the God who created us all, we defend and promote practices and policies that protect life and promote human rights, human flourishing, and peaceful solidarity. Because we are called to be peacemakers and agents of reconciliation, we work to reconcile relationships, reduce violence, and resolve political and social conflict.

America's killing by drone program finally became front page news this spring. Yet the bulk of the debate is around the legality of targeting U.S. citizens suspected of being al Qaeda leaders. That debate is too small. Whether the president has the legal authority to order the killing of U.S. citizens is certainly an important question, but there are more fundamental issues not being given as much scrutiny.

Beginning under President George W. Bush, and escalating under President Barack Obama, the United States is reportedly currently using armed drones in four countries (Afghanistan, Pakistan, Yemen, and Somalia), has used them in two others (Iraq and Libya), and is apparently considering using them in northern Africa. Some are operated by military special forces, others by the CIA.

We believe that the growing use of armed drones deserves the heightened scrutiny it is now receiving. Among the issues and questions raised are these.

Drone strikes violate international law. International law prohibits a country from carrying out military attacks in or against the territory of countries with which it is not at war. In only one place where attacks are currently taking place, Afghanistan, is the U.S. at least arguably, legally at war. The resolution that passed the U.S. Congress and was signed

by President George W. Bush following 9/11, authorized the use of force against “those nations, organizations, or persons” that “planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons ...” Whether that authorization still applies more than a decade later is questionable, but it provides at least some legal authority for the war in Afghanistan. In all other places, U.S. drone strikes are illegal.

Drone strikes violate the sovereignty of countries. The government of Pakistan has repeatedly objected to drone strikes on its territory as a violation of its sovereignty, but its concerns have been repeatedly ignored. Pakistan’s Ambassador to the U.S. has recently referred to the continuing attacks a “clear violation of our sovereignty and a violation of international law.” In addition to the official repercussions, there is evidence that the effect if these strikes on civilians is a growing hatred of the U.S. that translates into more rather than fewer militants. Whatever short-term security benefits are perceived to derive from these strikes, the negative long-term consequences may be far greater than previously thought.

The drone program has grossly inadequate transparency and accountability. The use of armed drones in countries other than Afghanistan is an officially secret program conducted by the CIA. These drones are remotely controlled, primarily from Air Force bases in the U.S., with no clear accountability, and with the targeting sometimes based on dubious intelligence. They are essentially assassinations of specific individuals. There have been four known deaths of Americans, while according to the Bureau of Investigative Journalism, at least 3,000 total deaths in Pakistan, Yemen and Somalia; more than 500 of them civilians. Such operations designed to kill specific human targets are easily manipulated by their dependence on intelligence information. Some are politically driven, for instance, where a politician or tribal leader sees it as a way to remove one of his opponents. And decisions are sometimes made to proceed with a strike even though the targeted individual may be in the company of others – his wife and children, or friends.

And in some instances, In Pakistan and more recently in Yemen, drone strikes are moving to what are called “signature” attacks, not aimed at specific individuals but at what are considered suspicious behavior “signatures” of al-Qaeda activity based on vehicles, facilities, communications equipment and patterns of behavior. And the president has

adopted a new method of counting civilian deaths – all military-age males in the area of a strike are considered militants, unless there is posthumous evidence they were civilians.

Drone strikes set a dangerous precedent. More than 70 countries now possess drone aircraft. While most of them are not armed, that is clearly the next step. The precedent the U.S. is setting of launching drones against countries could come back to haunt us. How would we feel if drones were launched, for example, from bases in Mexico and guided over the U.S. by controllers in China?

Drones make it easier to go to war. One of the restraints on military action is that commanders know they will suffer casualties of their own troops. Because the physical, mental, and emotional toll of war is so severe and makes war so devastating, countries are less likely to engage in it. Recognizing this toll is a huge disincentive to war, a nation will only take up arms if it can justify putting its soldiers/citizens through such an ordeal because the alternative is perceived as worse. It is why war has traditionally been seen only as a last resort. Drone strikes eliminate the threat of casualties to the attacking party, while making killing seem innocuous. They thus lessen the disincentives for making war.

The endless war on terror is a threat to our future. Following the 9/11 attacks in New York City and Washington, the Bush Administration made the decision to define it as a war on terror, rather than defining it as law enforcement against criminals. This definition allows for an endless war, across many countries, as groups using the al Qaeda name continue to spread, most of them with no connection to the original group responsible for 9/11. Do we really want a future of growing drone strikes in many countries?

While the proliferation of drones may already be past the point of no return, it is still worthwhile to question and oppose their use and misuse. At the very least, international law, especially the laws of war, must be revised and updated to take them into account. A world with thousands of unpiloted attack aircraft, for which national borders are irrelevant and whose pilots thousands of miles away are unregulated by law, would be a world of fear and anarchy in which no one would be safe. It's a nightmare that we can and must prevent.

Thank you.

Statement by A. Belden Fields, Professor Emeritus of Political Science
and scholar of human rights, University of Illinois, Urbana

There are a number of human rights issues raised by the use of drones, both domestically and internationally. In this brief statement I will restrict myself to the latter. Specifically to the way in which drones have been used in Pakistan, Yemen, and Somalia.

First, drones have become instruments of terrorism. If we define terrorism as the deliberate targeting of civilians, drones have been used against the domiciles of suspected or known armed militants when it was known, or when it could be realistically assumed, that family members or friends would be present. An example was the targeting of the compound of Nek Muhammad in South Waziristan, Pakistan that resulted in the deaths of several other people including children. It has been reported that the CIA assumes that any male of fighting age who is near an armed militant is also an armed militant. That is a dangerous and fallacious assumption, but it is used to justify the killing of young males who might not have any relationship to armed groups posing a threat to the US. Moreover, the constant flying of many drones at a time over small and impoverished communities in the above countries, with the people knowing that any one of them could fire a missile that would incinerate them puts the entire community in a state of terror.

Second, if have seen references to the use of secondary drone strikes, i.e., firing one strike and then waiting for people to come to the assistance of the wounded, and then firing a second strike to kill them as well. If tis is actually happening, and the committee should investigate this, then it constitutes a horrendous human rights violation.

Third, the drone attacks throw us back to the time when the CIA was actively involved in assassination, such as the assignation of Patrice Lumumba in the Congo, General Rene Schneider in Chile, and the attempts on the life of Fidel Castro. Moreover, in the case of Pakistan, we have become a gun for hire. Nek Muhammad was to threat to the U. S., but the Pakistani ISI wanted him dead. To curry favor with the Pakistanis, and to get them to pretend that they were themselves the source of drone attacks rather the U.S., rendered service to a most unreliable ally and tried to dishonestly avoid the heat for the attacks. Indeed, the killing of Anwar al-Awlaki in Yemen has established the precedent that the president can even declare a U.S. citizen to be a target of assassination. There was seen no need to try to apprehend him and bring him back to the U.S. for trial. The president was judge and jury, and the CIA or the American military was the executioner.

Fourth, the drone has made it much easier to kill rather than try to capture an opponent. The law of war says that if an enemy can be captured, it is an obligation to do that rather than kill. But now that the president has stated that there will be no more secret detention and interrogation centers, and that it is difficult for him to figure out what to do with the prisoners in Guantanamo, easy killing from the skies becomes less troublesome for the government and less dangerous for the killer than a direct confrontation. Indeed, one of the most horrible aspects about the killer drones is the piloting and firing the missile. It is like a video game, only real people die or are horribly wounded.



Conference of Major Superiors of Men

Armed Drones: Do They Make us Better People?

In February 2013, the Administration's legal argument for the use of armed drones was revealed in the press. The ACLU responded with legal critiques and the UN is in process of an analysis. Academics have been offering analysis as well, such as Michael Walzer and Maryann Cusimano Love. For the most part these analyses consider laws of war, "just" war theory, and civil rights. However, Cusimano Love's analysis notably mentions a key limit in that "just" war theory does not tell us how to build peace.

Focusing on the "just" war theory as the key frame of moral analysis for armed drones also fails to adequately engage our imagination for practices of nonviolent peacemaking. This focus also lowers our capacity to sustain peacemaking practices, and offers little insight into envisioning the justpeace which "just" war theory purports to intend. "Just" war theory also depends on, but doesn't develop the "just people" needed to interpret, apply, and revise the criteria.

But even more significant, "just" war theory doesn't prioritize or illuminate a more important moral question about human habits. Therefore, by taking a longer-term view of building a justpeace, I recommend we shift the primary analysis of armed drones from law, "just" war theory, and rights to the question, "*what kind of people are we becoming* by using armed drones?" The following discussion provides an example of where this ethical approach, i.e. virtue ethics, might draw us.

Increasing fear in communities

With drones killing people, we become the kind of people who cultivate fear in communities as they wonder when a drone is hovering and if they may be attacked just be in the wrong place at the wrong time. Drones provoke high anxiety in communities and children become especially afraid. Parents often fear sending their kids to school or going to the market. This anxiety and fear is incredibly destructive to trust in communities, and as many have pointed out, drone killing also leads increasing numbers of people to turn to other fear-based strategies, which includes acts we often describe as "terrorism."

Increasing impersonal engagements of conflict

Armed drones are an impersonal means of engaging conflicts. By increasingly relying on the latest destructive machine to settle conflict and destroy the other, we become increasingly less capable and willing to engage various conflicts in humanizing ways that are in accord with our human dignity. For instance, we become less likely to create conditions to defuse the hostility, such as using development programs, restorative justice practices, or nonviolent civilian resistance training. Further, we also become less likely to speak face-to-face with our opponents, less empathetic for the other, less prone to healing and more apt to

ignoring, excluding, de-faming, and even destroying in our various relationships. The capacity for empathy is a core virtue of human flourishing as President Obama has even promoted in the past. But armed drones significantly damage this capacity in ourselves as well as lowering the empathy that others may have for us.

This impersonal way of engaging conflict is also manifested in the video-game mentality of the drone controllers and thus exacerbates the objectification of others. Such objectification contributes to the habits in our culture of relating to others primarily as instruments for economic gain, political power, sexual gratification, etc. One of the more direct manifestations of this habit is the development of higher rates of post-traumatic stress syndrome in military drone operators compared to soldiers in combat zones.

Avoiding the roots of conflicts

Using armed drones also lowers our engagement of the roots of conflicts. Hence, although they may appear to be immediate or short-term resolutions, we soon end up facing the same conflict re-surfacing in new ways. Then we wonder why we seem to lurch from hostility to hostility. We must develop practices and habits that get closer to the roots of conflict to transform them into opportunities for growth and human flourishing. In our culture, this habit of avoiding root causes shows up too often in our criminal justice system, school disciplinary systems, immigration debate, and even friends' unwillingness to offer constructive critique to each other. Using armed drones will exacerbate this habit and cultural problems that arise from it.

Diminishing key virtues

Using armed drones diminishes other key virtues besides empathy. For instance, the virtue of *hope* in others, particularly regarding the capacity to change will falter. We see this showing up in the ways we too often disconnect, avoid, or give up on people who think differently than us in our families, in the criminal justice system, and in our political wrangling.

The virtue of *solidarity* with all people, especially the poor and marginalized will become less active. We damage solidarity not only by increasing fear and cultivating fear-based strategies of violence in poor and marginalized communities, but also by instigating an arms race in drones, which diverts funds away from those in urgent need.

The virtue of *courage* that risks one's life to lift up the dignity of all people will also be diminished. This is incredibly damaging to our capacity to imagine, enact, and sustain the practices of nonviolent civilian resistance, which has driven our greatest social movements and overthrown dictators across the globe in much more sustainable ways than any violent approach.

The virtue of *justice* also suffers in our culture as we ramp up armed drones. A preoccupation with technical legal issues regarding the use of lethal force, risks

diverting attention from the deeper and more significant form of justice that focuses on the harms done to relationships and how to heal them in ways that address human needs, i.e., restorative justice. Using armed drones damages our capacity to see the harm done to relationships and to imagine how to heal that harm in a sustainable way. Perpetuating this destructive habit will likely increase patterns in our culture such as our high recidivism, divorce and suicide rates, etc.

The virtue of nonviolent peacemaking which realizes the good of conciliatory love that draws enemies toward friendship, and the good of our ultimate unity and equal dignity of all people is also diminished by continued reliance on armed drones. To recognize this virtue is not to deny that violence is presently part of our experience, but to acknowledge that the habit of nonviolent peacemaking is an expression or basic component of human flourishing. For those professing Christianity, which many of our leaders do, Jesus' example clarifies that nonviolent peacemaking is a central virtue.

The strategies and tactics we engage become practices, which cultivate the character habits of human persons and societies. Although John Brennan claims that armed drones satisfy the "principle of humanity," the analysis above indicates some deeper concerns and a fuller vision of "humanity" we should attend to. Whether the reader resonates with all or even some of the above analysis, it should be more clear that the use of armed drones is inconsistent with human dignity and, thus, with the fullness of human rights, and even more important, human flourishing.

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The Administration's Targeted Killing is Illegal and Counter-Productive

Submission by Professor Marjorie Cohn

and Jeanne Mirer, Esq.

April 23, 2013

**Drone Wars: The Constitutional and Counterterrorism Implications
of Targeted Killing**

Hearing Before the Senate Judiciary Subcommittee on the
Constitution, Civil Rights, and Human Rights

April 23, 2013

The Administration's Targeted Killing is Illegal and Counter-Productive

By Marjorie Cohn and Jeanne Mirer

The Constitution forbids the government from depriving any person of life without due process of law; that is, arrest and fair trial. Yet President Obama has approved the killing of people, many of whom were not even identified before the kill order was given.

The administration justifies its use of armed drones with reference to the Authorization for the Use of Military Force that Congress passed just days after the September 11 attacks. In the AUMF, Congress authorized force against groups and countries that had supported the terrorist strikes. But Congress rejected the Bush administration's request for open-ended military authority "to deter and preempt any future acts of terrorism or aggression against the United States." Deterrence and preemption are exactly what President Obama is trying to accomplish by sending robots to kill "suspected militants" or those who happen to be present in an area where suspicious activity has taken place.

Moreover, in the National Defense Authorization Act of 2012, Congress specifically declared, "Nothing in this section is intended to . . . expand the authority of the President or the scope of the Authorization for the Use of Military Force [of September 2001]."

McClatchy recently published a report based on top-secret intelligence documents that indicate the administration is "misleading the public about the scope of who can legitimately be targeted." Micha Zenko, of the Council on Foreign Relations, wrote in *Foreign Policy* that the McClatchy article "plainly demonstrates that the claim repeatedly made by President Obama and his senior aides – that targeted killings are limited only to officials, members, and affiliates of al-Qaeda who pose an imminent threat of attack on the US homeland – is false."

Jo Becker and Scott Shane reported in the *New York Times* that President Obama maintains a "kill list" from which he personally makes the decision to have individuals executed without arrest and trial. The *Times* story, based on interviews with three dozen current and former Obama advisers, reports that "Mr. Obama has avoided the complications of detention by deciding, in effect, to take no prisoners alive. While scores of suspects have been killed under Mr. Obama, only one has been taken into U.S. custody" because he doesn't want to add new prisoners to Guantanamo.

Some people who do not fully understand the profound illegality of drone attacks find them preferable to the United States' all out invasions of more countries. We all need to understand that the unlawful precedent the United States is setting with its use of killer drones not only undermines the rule of law; it also will prevent the United States from reasonably objecting when other countries that obtain drone technology develop "kill lists" of persons those countries believe represent threats to them.

Although the United States is not at war with Yemen, Somalia or Pakistan, former President George W. Bush's "War on Terror" has morphed into President Obama's "War on Al Qaeda." President's "war" has been used as an excuse to assassinate anyone anywhere in the world whenever the President gives the order.

But “there is not a distinct entity called Al Qaeda that provides a sound basis for defining and delimiting an authorized use of force,” according to Paul P. Pillar, deputy director of the CIA’s Counterterrorist Center from 1997 to 1999. If President Obama identifies certain people living in Pakistan, Yemen or Somalia as members of Al-Qaeda who are desirous of committing acts of terror against the people of the United States, there is no basis in law for our government to declare war on individuals it considers a threat. The United States has legal means to indict and extradite, both under U.S. and international law.

“The CIA’s drone campaign has killed dozens of civilians who had gone to rescue victims or who were attending funerals,” a report by the London-based Bureau of Investigative Journalism found.

But, according to the *Times* article, President Obama has developed a creative way to count civilian casualties. All military-age men killed in a drone strike zone are considered to be combatants, “unless there is explicit intelligence posthumously proving them innocent.” As a result, John O. Brennan reported in 2011 that not one civilian had been killed during one year of strikes. An administration official recently claimed that the number of civilians killed by drone strikes in Pakistan was in the “single digits.” Three former senior intelligence officials told the *Times* that they couldn’t believe the number could be so low.

President Obama, who has been targeting “suspected militants” (called “personality strikes”) in Pakistan, Yemen and Somalia, even killing U.S. citizens, has authorized expanded drone attacks - whenever there are suspicious “patterns of behavior” at sites controlled by a terrorist group. These are known as “signature strikes.” That means bombs are being dropped on un-identified people who are in an area where suspicious activity has taken place. This goes beyond the illegal practice of “targeted killing.” People are being killed without even being an identified target.

Drone attacks also violate well-established principles of international law. A targeted killing is defined as the “intentional, premeditated, and deliberate use of lethal force . . . against a specific individual who is not in the physical custody of the perpetrator,” according to Philip Alston, former UN Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions. Targeted or political assassinations – sometimes known as extrajudicial executions – run afoul of the Geneva Conventions, which include willful killing as a grave breach. Grave breaches of Geneva are punishable as war crimes under the U.S. War Crimes Act.

Christof Heyns, the current UN Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, expressed grave concern about the targeted killings, saying they may constitute war crimes. He called on the Obama administration to explain how its drone strikes comport with international law, specify the bases for decisions to kill rather than capture particular individuals, and whether the State in which the killing takes place has given consent. Heyns further asked for specification of the procedural safeguards in place, if any, to ensure in advance of drone killings that they comply with international law. He also wanted to know what measures the U.S. government takes after any such killing to ensure that its legal and factual analysis was accurate and, if not, the remedial measures it would take, including justice and reparations for victims and their families. Although Heyns’

predecessor made similar requests, Heyns said the United States has not provided a satisfactory response.

Heyns also called on the U.S. government to make public the number of civilians collaterally killed as a result of drone attacks, and the measures in place to prevent such casualties. Once again, Heyns said the United States has not satisfactorily responded to a prior query for such information.

Likewise, UN High Commissioner for Human Rights Navi Pillay declared that U.S. drone attacks in Pakistan violate the international law principles of *proportionality* and *distinction*. Proportionality means that an attack cannot be excessive in relation to the anticipated military advantage sought. Distinction requires that the attack be directed only at a legitimate military target.

The United States has ratified the International Covenant on Civil and Political Rights. The ICCPR states: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." The Covenant also guarantees those accused of a crime the right to be presumed innocent and to a fair trial by an impartial tribunal. Targeted killings abrogate these rights.

Self defense under Article 51 of the United Nations Charter is a narrow exception to the Charter's prohibition of the use of force or the threat of force to settle international disputes. Countries may engage in individual or collective self-defense only in the face of an armed attack. To the extent the United States claims the right to kill suspected terrorists or their allies before they act, there must exist "a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation," under the well-established *Caroline Case*. President Obama's drone attacks do not meet this standard.

The United States' resort to ever increasing targeted killings is a direct result of the "War on Terror" the Bush administration declared after 9/11. Bush declared a perpetual war on a tactic and claimed all Al-Qaeda and Taliban are terrorists who may be preemptively killed as a form of self defense, rather than being arrested and tried for criminal acts. Although he does not use the phrase "War on Terror," President Obama has continued and even extended this policy. It is the product of a powerful military industrial complex in the United States, which sees the use of force as the first step to resolving disputes rather than a last resort, notwithstanding the strictures of the UN Charter.

This practice sets a dangerous precedent. Heyns opined that "any Government could, under the cover of counter-terrorism imperatives, decide to target and kill an individual on the territory of any State if it considers that said individual constitutes a threat." Heyns also cited information that indicates "the attacks increasingly fuel protests among the population." Heyns said the "lack of transparency" and "dangerous precedent" that drone attacks represent "remain of grave concern."

Drone strikes are also counterproductive. They breed increased resentment against the United States and lead to the recruitment of more terrorists. "Drones have replaced Guantanamo as the recruiting tool of choice for militants," Becker and Shane wrote in the

Times article. They quoted Faisal Shahzad, who, while pleading guilty to trying to detonate a bomb in Times Square, told the judge, "When the drones hit, they don't see children." Pakistani ambassador Zamir Akram told the Geneva Forum last week that the drone attacks are illegal and violate the sovereignty of Pakistan, "not to mention being counter-productive." He added, "thousands of innocent people, including women and children, have been murdered in these indiscriminate attacks."

A Pew Research Center poll conducted last year found that only 17 percent of Pakistanis supported drone strikes against leaders of extremist groups.

Becker and Shane noted, "[President Obama's] focus on strikes has made it impossible to forge, for now, the new relationship with the Muslim world that he had envisioned. Both Pakistan and Yemen are arguably less stable and more hostile to the United States than when Mr. Obama became president. Justly or not, drones have become a provocative symbol of American power, running roughshod over national sovereignty and killing innocents."

Ibrahim Mothana, who wrote an op-ed in the *Times* titled "How Drones Help Al Qaeda," agrees. "Drone strikes are causing more and more Yemenis to hate America and join radical militants; they are not driven by ideology but rather by a sense of revenge and despair," Mothana observed.

It is time to halt this dangerous and illegal practice.

Marjorie Cohn is a professor of human rights law at Thomas Jefferson School of Law, past president of the National Lawyers Guild, and editor of The United States and Torture: Interrogation, Incarceration, and Abuse (NYU Press). Jeanne Mirer is an attorney in New York City and president of the International Association of Democratic Lawyers.



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FRIENDS COMMITTEE ON NATIONAL LEGISLATION

... a Quaker lobby in the public interest

FCNL leads Faith-Based Organizations Oppose Lethal Use of Drones

April 16, 2013

President Barack Obama
The Office of the President of the United States
1600 Pennsylvania Avenue Northwest
Washington, DC 20500

Dear President Obama:

As people and communities of faith, we are moved to express our great concern about the use of armed unmanned aerial vehicles, known commonly as drones, for targeted killings of alleged members of Al Qaeda, its affiliates and other associated forces around the world.

The use of these lethal weapons within the borders of other sovereign nations, at times without their permission, shrouded in secrecy and without clear legal authority, raises serious moral and ethical questions about the principles and the implications of this practice for U.S. foreign relations and the prospects for a more peaceful world.

A threshold question: Is the U.S. at war?

If targeted killings by drones are justified as acts of war, they must be subject to international law on the use of lethal force within the borders of another sovereign nation. Without a clear showing of permission to use lethal force within another nation, or an imminent threat to the U.S. from that nation, these killings seriously undermine prohibitions in international law against the use of deadly force.

The administration and Congress should end the assertion that the U.S. is involved in a "global war," allowed by the "Authorization for the Use of Military Force" (AUMF), passed in September of 2001 and renewed in December of 2011, and should comply with international human rights law in all U.S. counter-terrorism operations.

If the U.S. is not at war, then other principles of human and civil rights must govern U.S. actions.

If these acts of targeted killing are police actions, rather than a matter of war, what right does the U.S. have to take these actions in another country? Rather than seeking to "eliminate" individuals from a so-called "kill list" who are suspected of involvement in or planning of violent criminal activity, or bombing sites that appear suspicious to remote drone operators, the administration should uphold U.S. and international admonitions that no one should be deprived of life arbitrarily. The U.S. should extend protections consistent with principles of human and civil rights pertaining to the pursuit and apprehension of a criminal suspect, including fair trial in a court of law. This expectation can and should be achieved in cooperation with other countries in accordance with their international obligations.

Additionally, protections consistent with principles of human and civil rights should be extended to uninvolved civilians, family members, and bystanders who often suffer in drone attacks.

Targeted killings do not address the root causes of conflicts and thus will not end violence against the U.S.

The practice of targeted killings, by drones in particular, provokes high anxiety in communities, as drones patrol neighborhoods. Drone killings destroy trust and lead increasing numbers of people to turn to fear-based responses, which may include acts we often describe as "terrorism." In addition, as the killings injure and threaten people who were previously uninvolved, drone attacks can boost recruitment for extremist organizations.

A far more effective strategy would be to address the root causes of conflicts by creating conditions that defuse the hostility, including strategies to prevent violent conflict and to promote restorative justice practices, and effective economic development programs.

Oversight and accountability are essential.

The administration appears to be creating a new kind of warlike campaign – a militarized police action – that follows neither the rules of war nor the rule of law. We urge the administration to follow judicial due process and we urge Congress to exercise oversight to guard against continuing or extending the practice of targeted killings, without charges or trial, of individuals suspected of presenting a threat to the U.S.

The natural checks on lethal violence must be maintained.

On an individual level, military trainers know that human nature itself serves as a check on lethal violence. Coming face to face with someone described as an enemy requires a deliberate choice to override a deep human instinct against killing. Remote, technical warfare removes that very human check. As a society we have not adequately considered where this development leads us as a species. The remote nature of this type of deadly violence has the potential to encourage overuse and extension of the policy to more countries and more perceived threats. Furthermore, by increasingly relying on targeted killings, we become increasingly less able and willing to engage various conflicts in humanizing ways that are in accord with human dignity.

Mr. President, we understand these matters are not simple. Nonetheless, we feel obliged as people and communities of faith to raise fundamental moral and ethical questions about the evolving kinds of warfare this nation is now pursuing. We urge you to give these issues more careful reflection and evaluation.

Sincerely,



Friends Committee on National Legislation
Diane Randall, Executive Secretary

NETWORK
Simone Campbell, SSS, Executive Director

Church of the Brethren
Nathan Holser, Coordinator, Office of Public Witness

United Methodist Church, General Board of Church and Society
James Winkler, General Secretary

Christian Reformed Church in Northern America
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United Church of Christ, Justice and Witness Ministries
Sandy Sorenson, Director, Washington Office

Disciples Justice Action Network
Rev. Dr. Jack Sullivan, President

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*Drone Wars: The Constitutional and Counterterrorism Implications of Targeted Killing***Hearing Before the Senate Judiciary Subcommittee on the
Constitution, Civil Rights, and Human Rights****April 23, 2013***Written Statement for the Record*

Jesselyn Radack
National Security and Human Rights Director

Kathleen McClellan
National Security and Human Rights Counsel

Chairman Durbin, Ranking Member Cruz, and Members of the Subcommittee,

We thank you for holding this important hearing and bringing much-needed oversight to the Obama administration's "targeted killing"¹ and drone warfare program. The Government Accountability Project (GAP), is an independent, nonpartisan, nonprofit organization that promotes corporate and government accountability by protecting whistleblowers and advancing occupational free speech. GAP is particularly concerned with any claim of executive power that is ill-defined and can be exercised in secret without judicial oversight² because the executive branch has used every tool in its power to retaliate against whistleblowers, including labeling

¹ While the media and Obama administration have referred to the program as the "targeted killing" program, we do not agree that the killings are all "targeted," nor do we agree that they comport with the Constitution and international law. We use the term "targeted killing" in this testimony only for the sake of clarity.

² See Brief of *Amicus Curiae* Government Accountability Project in support of Plaintiffs-Appellees and Affirmance, *Hedges v. Obama*, No. 12-3176, 12-3644 (2nd Cir. Dec. 17, 2012)

whistleblowers “enemies of the state” through criminal prosecution under the Espionage Act,³ detention and torture.⁴

The current administration has steadily increased the use of unmanned aerial drones to kill suspected terrorists abroad,⁵ and the administration has claimed extraordinary power to kill suspects, including the unilateral power to kill U.S. citizens, even citizens located away from a traditional battlefield.⁶ Despite that the Obama administration claims the awesome power to kill U.S. citizens in secret without charge, counsel, trial or judicial review, the public knows very little about the government’s criteria for determining who to kill. The public has been forced to rely upon selective and often anonymous disclosures from executive branch officials to determine the criteria for drone strikes. Making the lack of transparency more problematic, the administration has fought consistently to keep the courts from evaluating the program, arguing that even acknowledging the drone program would compromise national security.⁷ Until recently,⁸ the courts largely accepted the government’s assertions, and the “targeted killing” program has expanded exponentially without judicial oversight.

³ See, e.g. Jane Mayer, *The Secret Sharer*, THE NEW YORKER, May 23, 2011, at 47-57, available at http://www.newyorker.com/reporting/2011/05/23/110523fa_fact_mayer.

⁴ See, e.g. *Doe v. Rumsfeld*, 800 F. Supp. 2d 94, 100 (D.D.C. 2011) (Rev’d *Doe v. Rumsfeld*, 683 F.3d 390 (D.C. Cir. 2012)).

⁵ Scott Shane, *Targeted Killing Comes to Define War on Terror*, N.Y. TIMES, Apr. 7, 2013, at A1, available at http://www.nytimes.com/2013/04/08/world/targeted-killing-comes-to-define-war-on-terror.html?pagewanted=all&_r=0.

⁶ See John O. Brennan, Counterterrorism Advisor, “The Ethics and Efficacy of U.S. Counterterrorism Strategy,” Address at The Wilson Center (Apr. 30, 2012), available at <http://www.wilsoncenter.org/event/the-ethics-and-ethics-us-counterterrorism-strategy#>; Eric Holder, United States Attorney General, Speech at Northwestern University School of Law (Mar. 5, 2012), available at <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>; Department of Justice White Paper, “Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who is a Senior Operational Leader of Al-Qa’ida or An Associated Force (Nov. 8, 2011), available at http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf.

⁷ See, e.g. *ACLU v. CIA*, No. 1:10-cv-00436, at 6 (D.C. Cir. Mar. 15, 2013) (summarizing the government’s arguments), available at http://www.aclu.org/files/assets/tk_foia_dc_circuit_ruling.pdf.

⁸ Press Release, American Civil Liberties Union, DC Appeals Court Rejects CIA’s Secrecy Claims in ACLU’s Targeted Killing FOIA Lawsuit (Mar. 13, 2013) (on file with author), available at <http://www.aclu.org/national-security/dc-appeals-court-rejects-cias-secrecy-claims-aclus-targeted-killing-foia-lawsuit>.

Criteria for Targeted Killing Are Secret and Variable

Different administration officials have espoused different rationales and criteria for killing terrorist suspects, making it impossible for Americans to know under what circumstances the President believes he has the legal power to kill them.

In March 2012, Attorney General Eric Holder articulated some criteria this administration has decided to take into account when deciding who to kill: (1) “that U.S. Government has determined after a thorough and careful review that the individual poses an imminent threat of violent attack against the United States;” (2) “capture is not feasible;” and (3) “the operation would be conducted in a manner consistent with applicable law of war principles.”⁹ A Justice Department white paper belies these principles as it distorts the definition of “imminent” so that imminence “does not require the United States to have clear evidence that a specific attack on U.S. persons and interests will take place in the immediate future.”¹⁰ While serving as the President’s Counterterrorism Advisor, now Central Intelligence Agency (CIA) Director, John O. Brennan publicly articulated slightly different criteria for targeted killing, declaring that individuals should have some “particularized plan” to attack the U.S., and that “the mere possibility that a member of al-Qa’ida might try to attack us at some point in the future” would not be enough to warrant a drone strike.¹¹ Brennan went on to say that a drone strike would be appropriate if an “individual is himself an operative – in the midst of actually training for or

⁹ Eric Holder, United States Attorney General, Speech at Northwestern University School of Law (Mar. 5, 2012), available at <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>

¹⁰ Department of Justice White Paper, “Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who is a Senior Operational Leader of Al-Qa’ida or An Associated Force, at 7 (Nov. 8, 2011), available at http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf.

¹¹ John O. Brennan, Counterterrorism Advisor, “The Ethics and Efficacy of U.S. Counterterrorism Strategy,” Address at The Wilson Center (Apr. 30, 2012), available at <http://www.wilsoncenter.org/event/the-ethics-and-ethics-us-counterterrorism-strategy#>

planning to carry out attacks against U.S. interests” and that “the individual possesses the unique operational skills that are being leveraged in a planned attack.”¹²

In addition to Holder, Brennan, and the White Paper, other anonymous administration officials have espoused different principles and standards to the press¹³ and Obama himself has insisted that he decides to kill only in situations where there is “. . . a threat that is serious and not speculative. It has to be a situation in which we can't capture the individual before they move forward on some sort of operational plot against the United States.”¹⁴ Officials have also readily admitted that the criteria and “kill lists” are in constant flux: “The number of targets on the lists isn't fixed, officials said, but fluctuates based on adjustments to criteria. Officials defended the arrangement even while acknowledging an erosion in the caliber of operatives placed in the drones' cross hairs.”¹⁵

The result of the ever-evolving and secret criteria is that Americans have no reliable way of knowing even vaguely when and why the President believes he has the right to unilaterally and in secret give an order to have them killed.

Many Drone Strikes Do Not Meet Criteria

Making the secrecy worse, there is substantial evidence that the administration has ignored even the evolving criteria it has put forth to create a “rulebook” for the “targeted killing” program, and the criteria become even more elastic for drone strikes that kill more than just the

¹² *Id.*

¹³ See, e.g. Greg Miller, *Plan for Hunting Terrorists Signals U.S. Intends to Keep Adding Names to Kill Lists*, Wash. Post., Oct. 23, 2012, available at http://articles.washingtonpost.com/2012-10-23/world/35500278_1_drone-campaign-obama-administration-matrix (Quoting a “former U.S. counterterrorism official” saying that “[National Counterterrorism Center] is the keeper of the criteria.”).

¹⁴ CNN Wire Staff, *Drone Strikes Kill, Maim and Traumatize Too Many Civilians, U.S. Study Says*, CNN, Sept. 25, 2012, available at, <http://www.cnn.com/2012/09/25/world/asia/pakistan-us-drone-strikes>.

¹⁵ Greg Miller, *Plan for Hunting Terrorists Signals U.S. Intends to Keep Adding Names to Kill Lists*, Wash. Post., Oct. 23, 2012, available at http://articles.washingtonpost.com/2012-10-23/world/35500278_1_drone-campaign-obama-administration-matrix

person on the “kill list” or kill the wrong person or are undertaken not knowing who will be killed (so-called “signature strikes”).

It is clear from press reports and administration officials that the Justice Department authorized the American government to target and kill American cleric Anwar al-Awlaki. Al-Awlaki did not meet the supposed criteria required for killing of an American citizen. There is no credible evidence that al-Awlaki did anything other more than generally advance propaganda and indicate a desire to support al-Qaeda.¹⁶ In fact, the justifications the administration has put forth for killing al-Awlaki – that he made a martyrdom video, promoted hateful views, and had contact with other terrorists – do not constitute “particularized plan of attack.” These events happened in the past, and much of al-Awlaki’s alleged actions – which can never be tested in court because he is dead – would be protected by the First Amendment. The fact that al-Awlaki was on the “kill list” for over a year before the U.S. actually killed him is convincing evidence that there was no imminence to whatever threat the Obama administration thought al-Awlaki posed, no matter how far you distort the definition of “imminence.”¹⁷

Moreover, it is impossible for “signature strikes,” drone strikes where the government does not know who will be hit in an attack,¹⁸ to meet any of the criteria supposedly required for killing an American. The same is true for drone strikes that hit the wrong people. Even government officials have admitted that Anwar al-Awlaki’s American 16-year old son, who was

¹⁶ See, e.g. Anthony Shahid and David Kirkpatrick, *As the West Celebrates a Cleric’s Death, the Mideast Shrugs*, N.Y. TIMES, at A14, available at, <http://www.nytimes.com/2011/10/02/world/middleeast/as-the-west-celebrates-awlakis-death-the-mideast-shrugs.html>.

¹⁷ See, e.g. Charlie Savage, *Suit Over Targeted Killings Is Thrown Out*, N.Y. TIMES, Dec. 7, 2010, at A 12, available at <http://www.nytimes.com/2010/12/08/world/middleeast/08killing.html>.

¹⁸ Greg Miller, *Plan for Hunting Terrorists Signals U.S. Intends to Keep Adding Names to Kill Lists*, Wash. Post., Oct. 23, 2012, available at http://articles.washingtonpost.com/2012-10-23/world/35500278_1_drone-campaign-obama-administration-matrix (“The review process is compressed by not skipped when the CIA has compelling intelligence and a narrow window in which to strike, officials said. The approach also applies o the development of criteria for ‘signature strikes,’ which allow the CIA and JSOC [Joint Special Operations Command] to hit targets based on patters of activity . . . even when the identities of those who would be killed is unclear.”).

killed in another drone strike shortly after his father, did not meet any of the purported criteria for killing Americans. In fact, one senior administration official told the press that killing al-Awlaki's son was an "outrageous mistake."¹⁹

The more information the public learns about drone strikes and "targeted killing," the more it is clear that the Obama administration is not even adhering to its own ever-shifting standards. The *New York Times* recently reported on the supposed criterion that capture of a suspect be impossible:

Despite Mr. Brennan's protestations, an overwhelming reliance on killing terrorism suspects, which began in the administration of George W. Bush, has defined the Obama years. Since Mr. Obama took office, the C.I.A. and military have killed about 3,000 people in counterterrorist strikes in Pakistan, Yemen and Somalia, mostly using drones. Only a handful have been caught and brought to this country; an unknown number have been imprisoned by other countries with intelligence and other support from the United States. . . . Though no official will publicly acknowledge it, the bottom line is clear: killing is more convenient than capture for both the United States and the foreign countries where the strikes occur.²⁰

McClatchy reported a similar abandonment of the arbitrary criteria the Obama administration has promulgated:

Contrary to assurances it has deployed U.S. drones only against known senior leaders of al Qaida and allied groups, the Obama administration has targeted and killed hundreds of suspected lower-level Afghan, Pakistani and unidentified "other" militants in scores of strikes in Pakistan's rugged tribal area, classified U.S. intelligence reports show. . . . Copies of the top-secret U.S. intelligence reports reviewed by *McClatchy*, however, show that drone strikes in Pakistan over a four-year period didn't adhere to those standards.²¹

¹⁹ Karen DeYoung, *A CIA Veteran Transforms U.S. Counterterrorism Policy*, WASH. POST, Oct. 24, 2012, available at, http://www.washingtonpost.com/world/national-security/cia-veteran-john-brennan-has-transformed-us-counterterrorism-policy/2012/10/24/318b8ccc-1c7c-11e2-ad90-ba5920e56cb3_print.html ("One of the officials called the second attack 'an outrageous mistake. . . . They were going after the guy sitting next to him.'").

²⁰ Scott Shane, *Targeted Killing Comes to Define War on Terror*, N.Y. TIMES, Apr. 7, 2013, at A1, available at http://www.nytimes.com/2013/04/08/world/targeted-killing-comes-to-define-war-on-terror.html?pagewanted=all&_r=0.

²¹ Jonathan S. Landay, *Obama's Drone War Kills 'Others,' Not Just al-Qaida Leaders*, MCCLATCHY NEWSPAPERS, Apr. 9, 2013, <http://www.mcclatchydc.com/2013/04/09/188062/obamas-drone-war-kills-others.html>.

The public should not have to rely on media reports and selective high-level executive branch leaks to determine whether the executive is adhering to his own standards when he decides to kill even U.S. citizens using drone strikes. It is a remarkably dangerous precedent to allow one branch of government the unchecked power to kill U.S. citizens in secret. Such unilateral executive power is antithetical to the Constitutional principles of due process and checks and balances and democracy itself.

Administration Resists Court Oversight

The Obama administration has consistently fought against any court oversight of its “targeted killing” program. The Justice Department’s white paper opines that courts should not be involved in deciding who the government can target and kill.²² The Justice Department’s response to lawsuits and Freedom of Information Act (FOIA) requests, including requests filed by GAP,²³ has been that the government can “neither confirm nor deny” the existence of the drone program or the legal memorandum authorizing al-Awlaki’s killing.²⁴ The government has continued to adopt this position even as senior administration officials, and President Obama himself, comment publicly on the program and legal justifications for it.²⁵ The Court of Appeals

²² Department of Justice White Paper, “Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who is a Senior Operational Leader of Al-Qa’ida or An Associated Force, at 10 (Nov. 8, 2011), available at http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf (“The Department notes that under the circumstances described in this paper, there exists no appropriate judicial forum to evaluate these constitutional considerations.”)

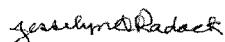
²³ Kathleen McClellan, *GAP FOIAs Justice Department Assassination Memo*, WHISTLEBLOGGER, Oct. 10, 2011, <http://www.whistleblower.org/blog/31-2010/1535-gap-foias-justice-department-assassination-memo>.

²⁴ See, e.g. Jesselyn Radack, DAILY KOS, *Absurd Secrecy: DOJ Claims Existence (or Nonexistence) of al-Awlaki Memo is Classified*, Oct. 25, 2011, <http://www.dailykos.com/story/2011/10/25/1029814/-Absurd-Secrecy-DOJ-Claims-Existence-or-Nonexistence-of-al-Awlaki-Memo-is-Classified>.

²⁵ Peter Finn, *Secret U.S. Memo Sanctioned Killing of Aulaji*, WASH. POST, Sept. 30, 2013, available at http://articles.washingtonpost.com/2011-09-30/world/35274507_1_qaeda-drone-strike-anwar-al-aulaji (quoting administration officials); Charlie Savage, *Secret U.S. Memo Made Legal Case to Kill a Citizen*, N.Y. TIMES, Oct. 9, 2011, at A1, <http://www.nytimes.com/2011/10/09/world/middleeast/secret-us-memo-made-legal-case-to-kill-a-citizen.html?pagewanted=all>; Karen DeYoung, *After Obama’s Remarks on Drones, White House Rebuffs Security Questions*, WASH. POST, Jan. 31, 2012, available at http://www.washingtonpost.com/world/national-security/after-obamas-remarks-on-drones-white-house-rebuffs-security-questions/2012/01/31/g1QA9s2LgQ_story.html.

for the D.C. Circuit recently rejected the government's continued denials of the program's existence in a FOIA lawsuit, but the administration has yet to release any of the requested documents.²⁶ Without court oversight, the Obama administration will be permitted to maintain its claims that the President possesses the sole, unilateral authority to decide under what circumstances he is permitted to kill an American citizen without charge, counsel, trial or judicial review. While the administration's insistence that the President uses criteria to determine who to kill, without court oversight this President – or the next President – can change those criteria in secret, or abandon them all together. When the power the executive claims is to kill American citizens far from an active battlefield and without due process, any democracy should require both judicial and congressional oversight.

We commend the Members of the Subcommittee for their attention to this critical issue, and hope today's hearing signals a renewed commitment to aggressive congressional oversight of the "targeted killing" program and drone warfare. We urge the Subcommittee to push for more transparency in the area of "targeted killing" and drone warfare so that Congress, the courts and the American public can have an open and informed debate about the wisdom and constitutional implications of using drones to kill suspected terrorists.



Jesselyn Radack
National Security and Human Rights Director
Government Accountability Project



Kathleen McClellan
National Security & Human Rights Counsel
Government Accountability Project

²⁶ Press Release, American Civil Liberties Union, DC Appeals Court Rejects CIA's Secrecy Claims in ACLU's Targeted Killing FOIA Lawsuit (Mar. 13, 2013) (on file with author), *available at* <http://www.aclu.org/national-security/dc-appeals-court-rejects-cias-secrecy-claims-aclus-targeted-killing-foia-lawsuit>.

Drone Wars:
The Constitutional and Counterterrorism Implications of Targeted Killing
Hearing Before the Senate Judiciary Subcommittee on the
Constitution, Civil Rights, and Human Rights
April 23, 2013

**Submission by the National Organization for Defending Rights and Freedoms,
 Alkarama, and the Center for Constitutional Rights**

Chairman Durbin, Ranking Member Cruz, and Members of the Subcommittee:

The submitting organizations would like to thank you for holding this critical hearing.

The National Organization for Defending Rights and Freedoms (HOOD) is a leading non-profit, non-partisan and non-governmental human rights organization in Yemen, founded in 1998. HOOD seeks the equal application of the law and equal protection under the law for all Yemeni citizens and residents. It provides pro bono legal assistance to victims of torture and human rights abuses, conducts trainings and advocacy campaigns to raise legal and human rights awareness among, in particular, underprivileged segments of the society, and monitors human rights abuses. Our core values are credibility, transparency and to equally address all cases of human rights violations.

Alkarama is a Swiss-based, independent human rights organization established in 2004 to assist all those in the Arab World subjected to, or at risk of, extra-judicial executions, disappearances, torture and arbitrary detention. Acting as a bridge between individual victims in the Arab world and international human rights mechanisms, Alkarama works towards an Arab world where all individuals live free, in dignity and protected by the rule of law. In Arabic, Alkarama means dignity. We are concerned that drone strikes in Yemen have caused the extra-judicial executions of hundreds of individuals in Yemen, and we hope this hearing will allow for a reversal of this very negative trend.

The Center for Constitutional Rights (CCR) is a non-governmental organization dedicated to advancing and protecting the rights guaranteed by the U.S. Constitution and the Universal Declaration of Human Rights. Our interest in this hearing stems from our efforts over the past several years to enforce the rule of law and ensure accountability for targeted killings by the United States. In 2010, CCR and the ACLU filed *Al-Aulaqi v. Obama*, which challenged the authorization for the targeted killing of U.S. citizen Anwar Al-Aulaqi in Yemen. Last year, our organizations filed *Al-Aulaqi v. Panetta*, now pending, which seeks accountability for the killings of Al-Aulaqi and two other U.S. citizens, Samir Khan and 16 year-old Abdulrahman Al-Aulaqi, from U.S. drones strikes in Yemen in September and October 2011.

This submission seeks to provide information about the largely untold civilian impact of U.S. targeted killing operations in Yemen, based on field investigations conducted by HOOD and Alkarama in Yemen in 2012 and 2013. While the research remains ongoing and the sample discussed here is limited, the direct accounts of victims and community members are intended to provide a lens into the human toll of US operations in Yemen and a basis for further inquiry by the Subcommittee, including about the official numbers of those killed and injured, the criteria for classifying casualties as civilians and “militants” or “combatants,” and any procedures to investigate reports of civilian harm and provide redress.

Background

From 2002 to the present, the United States has conducted dozens of targeted killing operations in Yemen.¹ The first credibly reported strike in Yemen post-9/11 was in November 2002, when an unmanned CIA drone fired at a car, killing all of its six passengers, including an American citizen.² The next known strike, and the first under the Obama Administration, was on December 17, 2009, when a U.S. cruise missile struck the village of al-Majalah in southern Yemen, killing 41 members of two families, half of whom were children, ages 1 to 15.³ Since then, U.S. operations in Yemen have increased each year through 2012,⁴ alongside a reported expansion of operations from “personality strikes” against identified individuals suspects to “signature strikes,” long used in Pakistan, against unknown individuals on the basis of patterns of suspicious behavior.⁵ While official data about casualties is not publicly available, credible sources report that hundreds have been killed so far.⁶

¹ The Bureau of Investigative Journalism reports 44-54 confirmed U.S. drone strikes, 77-95 possible additional US drone strikes, and 12-76 other covert U.S. operations in Yemen from 2002 to 2013. Bureau of Investigative Journalism, *U.S. Covert Action in Yemen*, <http://www.thebureauinvestigates.com/2013/01/03/yemen-reported-us-covert-actions-2013/>. The Long War Journal reports 67 U.S. airstrikes since 2002. The Long War Journal, *Charting the Data for U.S. air strikes in Yemen, 2002-2013*, <http://www.longwarjournal.org/multimedia/Yemen/code/Yemen-strike.php>. The New America Foundation reports 65 U.S. drone strikes since 2002. New America Foundation, *Obama's Covert War in Yemen*, <http://yemendrones.newamerica.net/>.

² See Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, Study on Targeted Killings, ¶ 19, UN Doc. A/HRC/14/24/Add.6, May 28, 2010.

³ See Press Release, Amnesty International, Yemen: Images of Missile and Cluster Munitions Point to US Role in Fatal Attack (June 7, 2010), <http://bit.ly/ySbSkt>; The Bureau of Investigative Journalism, Yemen: reported covert US actions 2001-2011 (reporting the December 17, 2009 strike and listing victims' ages).

⁴ See Bureau of Investigative Journalism, *U.S. Covert Action in Yemen*; The Long War Journal, *Charting the Data for U.S. air strikes in Yemen, 2002-2013*, <http://www.longwarjournal.org/multimedia/Yemen/code/Yemen-strike.php>.

⁵ Greg Miller, *CIA seeks new authority to expand Yemen drone campaign*, Washington Post, Apr. 18, 2012, http://articles.washingtonpost.com/2012-04-18/world/35453346_1_signature-strikes-drone-strike-drone-program; Jo Becker and Scott Shane, *Secret Kill List Proves a Test of Obama's Principles and Will*, New York Times, May 29, 2012, <http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?pagewanted=all>.

⁶ The Bureau of Investigative Journalism reports 233-333 killed by confirmed U.S. drone strikes, 277-443 killed by possible additional US drone strikes, and 146-366 killed by other covert U.S. operations in Yemen from 2002 to 2013. Bureau of Investigative Journalism, *U.S. Covert Action in Yemen*, <http://www.thebureauinvestigates.com/2013/01/03/yemen-reported-us-covert-actions-2013/>. The Long War Journal reports 411 killed by U.S. airstrikes since 2002. The Long War Journal, *Charting the Data for*

The Administration asserts that it is engaged in a global armed conflict with Al Qaeda, the Taliban and associated forces, and that it may target suspects who are part of these groups under the 2001 Authorization for the Use of Military Force, the laws of war, and the international law of self-defense. But whether all U.S. targeted killing operations in Yemen since 2009 can be justified as such depends on objective legal and factual criteria.⁷ Beyond asserting armed conflict and self-defense theories, the administration has not explained how it believes these theories legally support its operations in Yemen.

For operations that are not justified by an armed conflict rationale,⁸ domestic and U.S. international human rights obligations, including under the International Covenant on Civil and Political Rights, provide the appropriate framework for the use of lethal force, under which killing in the absence of due process is strictly prohibited except as a last resort to address a specific and imminent threat, and measures are required to protect bystanders from harm. For those operations that may be within an armed conflict, the laws of war still provide constraints on the use of lethal force. In the context of armed conflict involving non-state armed groups, the fundamental law of war requirement of distinction prohibits killing civilians who are not directly participating in hostilities. The requirement of proportionality requires all feasible measures to protect bystanders, which includes refraining from conducting operations in civilian locations.

Whichever the legal framework, there must be meaningful transparency and accountability for operations that violate the law. In his confirmation hearing before the Senate Intelligence Committee, John Brennan acknowledged that the United States should acknowledge its mistakes with respect to these operations. Indeed, the Administration should investigate alleged violations and provide redress to victims where appropriate. It should also cease opposing ex post judicial review of claims alleging violations.

Incidents of civilian harm

The accounts below are provided by HOOD and Alkrama, and are based on their field research in Yemen in 2012 and 2013. The accounts describe a sampling of five strikes that were reportedly conducted or supported by the United States, some of which resulted in some of the highest civilian death tolls in recent years:

U.S. air strikes in Yemen, 2002-2013, <http://www.longwarjournal.org/multimedia/Yemen/code/Yemen-strike.php>. The New America Foundation reports a minimum of approximately 400 killed by U.S. drone strikes since 2002. New America Foundation, *Obama's Covert War in Yemen*, <http://yemendrones.newamerica.net/>.

⁷ For a fuller discussion of the legal issues, see April 11, 2013 Letter to President Obama, Re: Shared Concerns Regarding U.S. Drone Strikes and Targeted Killings, which was submitted by CCR and other organizations to the Committee for consideration in connection with this hearing.

⁸ Self-defense under the UN Charter does not concern the legality of the use of lethal force against an individual target; it has only to do with the question whether the use of force in a receiving state violates its sovereignty.

- On May 15, 2012, at least two airstrikes in quick succession killed at least 14 people in a residential area of the town of Ja'ar in the southern governorate of Abyan,⁹ reducing an entire block to rubble.¹⁰ Local witnesses suspected U.S. drones.¹¹ The first strike slammed into a residential house, and was followed by a second strike that killed at least 13 passers-by who had gathered in front of the destroyed house, including a pregnant woman who died from flying shrapnel.¹² The civilian death toll was the highest attributed to airstrikes in nearly a year.¹³ The day after the strikes, the Red Cross expressed "extreme concern" about the increasing number of civilian casualties in Ja'ar and allegations of airstrikes in civilian locations."¹⁴
- On August 29, 2012, U.S. drone strikes killed five people in a residential area in the village of Khashamir in the northeast governorate of Hadramout, including at least two civilian bystanders. One was a cleric, a father of seven, who opposed extremism and had in fact given a speech denouncing Al Qaeda days before he was killed; the other was his cousin, a police officer.¹⁵ Their deaths provoked anger and large demonstrations in the local community.
- On September 2, 2012, U.S. missiles fired on a truck carrying 14 passengers, killing 11 and injuring three,¹⁶ in the Walad Rabi' district in the central governorate of Al-Bayda'. The dead included three children ages 12 and 13. The Yemeni government initially claimed that those killed were Al Qaeda militants and that its jets had carried out the attack. But tribal leaders and Yemeni officials would later say that it was an American assault and that all the victims were civilians who lived in a village near Rada'a in central Yemen. In response to questions about

⁹ Bureau of Investigative Journalism, *Yemen: reported covert U.S. action 2012*, <http://www.thebureauinvestigates.com/2012/05/08/yemen-reported-us-covert-action-2012/>; Amnesty International, *Conflict in Yemen: Abyan's Darkest Hour*, at 35-36, July 2012, <http://www.amnesty.org/en/library/asset/MDE31/010/2012/en/5c85d728-a9ab-4693-afe9-edec2b8670e/mde310102012en.pdf>.

¹⁰ Kelly McEvers, *Yemen Airstrikes Punish Militants, and Civilians*, National Public Radio, July 6, 2012, <http://www.npr.org/2012/07/06/156367047/yemen-airstrikes-punish-militants-and-civilians>.

¹¹ See, e.g., Hakim Almasmari, *Two suspected U.S. drone strikes reported in Yemen*, CNN, May 15, 2012, http://edition.cnn.com/2012/05/15/world/meast/yemen-violence/index.html?hpt=imi_c2; Bill Roggio, *U.S. drone strikes kill 7 AQAP fighters, 8 civilians in Yemen*, The Long War Journal, http://www.longwarjournal.org/archives/2012/05/us_drone_strikes_kil_2.php; New America Foundation, *Obama's Covert War in Yemen*.

¹² Amnesty International, *Conflict in Yemen: Abyan's Darkest Hour*, at 35.

¹³ Bureau of Investigative Journalism, *Yemen: reported covert U.S. action 2012*.

¹⁴ ICRC, *Yemen: scores of civilian casualties in intense fighting in Abyan*, News Release 106/12, May 15, 2012, <http://www.icrc.org/eng/resources/documents/news-release/2012/yemen-news-2012-05-16.htm>.

¹⁵ Robert Worth et al., *Drone Strikes' Risks to Get Rare Moment in the Public Eye*, New York Times, Feb. 5, 2013, http://www.nytimes.com/2013/02/06/world/middleeast/with-brennan-pick-a-light-on-drone-strikes-hazards.html?pagewanted=all&_r=1&_.

¹⁶ Sudarsan Raghavan, *When U.S. drones kill civilians, Yemen's government tries to conceal it*, Washington Post, Dec. 24, 2012, http://www.washingtonpost.com/world/middle_east/when-us-drones-kill-civilians-yemens-government-tries-to-conceal-it/2012/12/24/bd4d7ac2-486d-11e2-8af9-9b50eb4605a7_print.html.

the operation, anonymous U.S. officials in Washington said the strikes had been carried out by Defense Department aircraft, either a drone or a warplane.¹⁷

- On December 24, 2012, a strike in the town of Al-Shihr in the Hadramout province killed at least four people whose identities were not disclosed. A “security official” said the missiles came from “an American drone.”¹⁸ While an unattributed statement posted on an Ansar al-Mujahideen website later named two fighters among the dead, the Long War Journal reported that their roles were not known and that they were “most likely low-level fighters ... who are battling the local government.”¹⁹ Children were playing soccer in a nearby field, and at least one suffered long-lasting shock.
- On January 23, 2013, a strike on a car outside of the capital of Sana’a killed its four passengers. Yemeni Ministry of Defense officials reported that the attack was by a U.S. drone.²⁰ While news reports described the dead as “militants,” at least one was a local schoolteacher.

May 15, 2012, Ja’ar

There have been a number of dead and wounded in Ja’ar and the surrounding area, including women and children, from aircraft and artillery attacks. The largest attack occurred on May 15, 2012, when an airstrike targeted a family home in the middle of the city. The owner, Nour Muhammad Abdullah al-Arshani, age 33, was killed in an initial strike. Many residents had come to help in the rescue operations when the aircraft reappeared a few minutes later and fired a number of rockets at the people. At least 14 people were killed and dozens of others were wounded.

Abdullah Salih Hussein, age 45, father of Muhammad Hussein, one of the dead, stated: “After the first strike, I went with others to aid the wounded. My son Muhammad also came to help the victims. Only a few minutes passed when a second strike fired at the group. Many people were killed, including Muhammad. I was close to him, but I was not harmed. I heard one of them calling me, saying, ‘Come, take your son Muhammad.’ I went closer and saw a number of people die at that moment. I saw their remains scattered on the ground. My son Muhammad was hit with shrapnel in the neck and stomach; he died instantly.”

¹⁷ *Id.*

¹⁸ AFP, *Drone strikes kill 6 Qaeda suspects in Yemen*, Dec. 24, 2012, http://www.google.com/hostednews/afp/article/ALeqM5h_Q1B21VpazmTwsc6fStC7v4hH_g?docId=CNG.d5fe4faf34391046ead8ee4c3523a099.661; see also, Reuters, *Two drone strikes kill five in Yemen – officials*, Dec. 24, 2012, http://www.swissinfo.ch/eng/news/international/Two_drone_strikes_kill_five_in_Yemen_officials.html?cid=34593414.

¹⁹ Bill Roggio, *Jihadist identifies 2 AQAP fighters killed in recent drone strike*, The Long War Journal, Dec. 27, 2012, http://www.longwarjournal.org/archives/2012/12/jihadist_identifies.php.

²⁰ See, e.g., Hakim Almasmari, *Drone strike kills six suspected militants in Yemen*, CNN, Jan. 24, 2013, <http://edition.cnn.com/2013/01/23/world/meast/yemen-drone-strike/>.

Another surviving witness, Muhammad Salih Abdullah al-Amri, age 65, a taxi driver, stated: “I was working on my car when I heard the sound of an explosion. I saw smoke rising, so I hurried to the area in my car. I asked the people in the area what happened and they said that a strike had targeted the al-Ashrani house. My house is adjacent to the al-Ashrani house. I came and found that my house had been destroyed. Three members of my family had been in the house. One of them was injured, while the other two were not hurt. I took all of them and moved them to the house of one of my relatives in the city. I returned after a few minutes to the location. The aircraft returned to bomb the people who had gathered to aid the wounded from the first strike. Rockets fell a few meters away from me. I was in my car and saw that it was on fire. I quickly got out of the car and saw a number of people in front of me lying on the ground. They were burning without any clothes. I saw at least seven or eight of them die at that moment.”

Among those wounded in the strikes was Nour Awad Haydara al-Hawla, age 60, who suffered a sudden stroke from the shock of the explosions near her home.

The residents of this area say that death could come at any moment. They have stopped documenting the names of victims. Death has become the norm, as if those who die are not human but insects. Imagine the government granting blood relatives of victims ten thousand riyals (50 dollars) compensation. The people have lost all confidence in the authorities because the regime is corrupt, whether the former or current one. The majority of victims of the air attacks have been civilians, while the dead “al-Qaeda” have been few. The people here say that the Yemeni planes only kill civilians, while Saudi and American aircraft appear to be more accurate at targeting. This isn’t to praise the American aircraft. The truth is that this has become a test range for the use of various weapons.

As a journalist and college teacher from the region, Ahmed Mahdi Salim al-Awlaki, age 42, observed: “Abyan Governorate, especially the cities of Zinjibar and Ja’ar experienced a painful tragedy. We live with death and the smell of death; it has become our friend and companion. It walks with us and covers our sitting rooms.”

August 29, 2012, Khashamir

The Hadramout province in southern Yemen, which is known as a peaceful and law-abiding region, was the scene of many American drone attacks during 2012. Local residents see the attacks as a display of power and a provocation of the feelings of helpless, weak people. During visits to many of the regions in the province that had experienced American drone attacks, residents expressed strong resentment toward these provocative acts of aggression, for which they found no justification, and to which they had never before been accustomed.

On August 29, 2012, four loud explosions rocked the village of Khashamir around 9:30 p.m. At least four missiles struck five people, scattering their corpses. The missiles fell successively at a distance of about ten or fifteen meters from occupied residential

buildings, near pedestrian paths. The explosions caused the windows of the surrounding houses to break and the walls of the houses to crack. The shrapnel of the missiles flew for several meters, striking and killing some pedestrians. A number of women and children suffered shock and were rushed to hospitals.

The Yemeni Ministry of Defense announced the killing of three “terrorists” without giving their identities, but did not mention the deaths of the two other victims, who had no connection at all to Al Qaeda. The two were Salim bin Ahmad bin Salim bin Ali Jabir, age 50, and his cousin, Walid Abdullah Abdul-Mahmoud bin Ali Jabir, age 26. Salim was the father of seven children, a preacher at a local mosque, and a teacher. He was working on his doctorate at the University of Hadramout. Walid had a two and half year old son and worked as an officer with the traffic police.

The locals in Khashamir still talk about Salim and his resistance to extremist ideas. Days before his death, he had given a speech in which he warned of the danger of accusing others of being infidels and shedding blood. His message aroused the resentment of some Al Qaeda sympathizers, who asked to discuss the matter with him. The day he was killed, he had agreed to speak to them. He took his cousin Walid for protection. As they were talking at the entrance of the village, American drones rained missiles down on them.

Salim’s mother died a month and half after the incident, still in shock from the explosions and grief over her son. Salim’s oldest son Muhammad, age 19, is mute but spoke in sign language about the grief he has felt since losing his father.

A state of anger prevailed throughout the region after the strikes, expressed in large demonstrations condemning the strikes. We saw written slogans on the walls at the entrances of the city: “No to American bombings,” and “No to American occupation.”

Several witnesses provided testimonials. Ahmad bin Salim Salih bin Ali Jabir, age 77, Salim’s father, stated: “I was sitting in the courtyard of the house with Salim’s mother, and suddenly we saw a missile light up the sky. It exploded there near the house. I got up to see where the missile had fallen, and when I returned I found Salim’s mother on the ground. She had fainted from the shock of the explosions that followed the falling of the successive missiles, which shook the location very hard. They came from more than one direction, the first, second, third, and fourth missiles.

“... I dragged Salim’s mother inside the house. I then went outside to see what had happened. I found families and people gathered at the site of the incident, wrapping up body parts of people from the ground, from here and there, putting them in grave clothes like lamb. One of them came to me and took my hand and said: ‘Where is your son Salim?’ I told him that Salim had gone to visit his friend the day before in the village nearby, and that he would return here the next day, and then go to Al-Makalla to perform a teaching assignment. But the friend he had gone to stay with, Sayf, was there at the site. Sayf came and took me by the hand, murmuring, ‘Praise God. Praise God, father of Salim.’ As soon as he said, ‘Praise God,’ it was as if I awoke and became aware of

something I was not expecting to happen. Salim left behind seven children. No one came to stand by me for what happened to me, neither from the government nor anyone else.”

The brother of Walid Abdullah Abdul Mahmoud bin Ali Jabir stated: “The name of Walid’s two and half year old son was Saud, but the family changed his name to the name of his father. The boy now lives with his mother. Their situation is very difficult and they are in continuous grief. I ask God to help the son. Whenever he hears the sound of an airplane, he screams and yells, ‘The plane, the plane, the plane, my father, my father, I want my father.’ By God, he makes us cry every day.”

Dr. Abdullah Jabir, age 40, a relative of one of the victims and a community leader, stated: “Four missiles struck the region after evening prayers. There are remains of the fourth missile, which exploded near the home of one of the townspeople. The missiles melted iron.

“... People were scared. The region was in a state of fear and terror. The women and children were screaming loudly because of the severity of the explosion. Some windows were broken and houses were cracked. Some rooms fell down, because the buildings here are old, and most of them are made of clay. Even the mosque was damaged.

“... Sheikh Salim bin Ahmad bin Salim bin Ali Jabir was one of the civilian martyrs. He was the imam and preacher of the Al-Mutadarrarin mosque in Al-Makalla. He was an educator who worked as a teacher and was working on his doctorate at the University of Hadramout. He was a man known for his peacefulness, enlightenment, and balance. In addition to that, the people of Hadramout as a whole hate acts of violence. They are known for their peacefulness. They know right from wrong. Leaders of society, religious men, and scholars are in every part of Hadramout, and they expend great efforts to make the youth aware of the dangers of extremism and violence. They work towards a solution to disagreements and other problems that occur in our country. My friend Walid Abdullah Abdul Mahmoud bin Ali Jabir worked as an officer with the traffic police. He was a peaceful young man, and he was the father of one child. He was respected and honored by his family and friends. He was killed for no wrong of his.

“... Even if we were to grant the assumption that those people were truly wanted men, there needs to be respect for the women, children and old men, and the rest of the inhabitants of the region. This kind of behavior reflects a picture of America. It is she that terrifies those who are living in safety, and violates the rights of the innocent and kills defenseless civilians, without trial or investigation. We condemn, denounce, and decry this unfair assault. We ask for people to support us, stand with us, and help us regain our rights, our honor, and the honor of our whole region from this injustice, these infractions, these violations of sovereignty, and this invasion of territory.”

Muhammad Nasir bin Ahmad bin Ali Jabir, age 28, a relative of one of the victims, stated: “The catastrophe that shook this peaceful village is a tragedy according to any international standards. These planes send terror into the hearts of people and

spread blood in this region, whose people are known for peace, security, stability, and tranquility. Just hearing the sounds of these planes sends terror, fright and dismay into the souls of people. A person leaves his house in the morning and he looks right and left, not knowing from where a blow might come that would be his end. This psychological state is unbearable for people to live in. This by itself causes terror.

“... My message to the world, which calls for freedoms and respect of human rights: The people who live in this country are part of this world and are asking for a minimum level of human rights. The site of these strikes cannot resemble what the world is demanding and what America claims as far as achieving safety, justice, stability, and freedom for people. The message I send from here is to help and support the families of the victims.”

September 2, 2012, Walad Rabi'

For more than a year, a state of terror and fear has fallen over the Walad Rabi' district in the Al-Bayda' governate because of drones, which hover over the region. On September 2, 2012, a strike targeted a car carrying 14 civilians, including women and children on their way back to their villages at midday. Eleven were killed immediately, including three children ages 12 and 13, and three were injured.

One of those killed was Mabruk Muqbil Al-Daqari, age 13. His father said on the day of his burial: “Everyone loved Mabruk, but the one who loved him most was his grandfather, whom we have not dared to inform of his death until now.” Another victim, Dawlat Nasir, age 12, died with her father and mother as they were returning from a visit to a doctor in the city. At the morgue, her small body was wrapped in cloth, but her hands were open and stretched out. When we asked why, we were told that she was hugging her mother when the missile exploded, and died hugging her mother. They were separated, but her arms were still stretched out.

With great difficulty we were able to enter the national hospital in Sana'a on September 4 to see the dead and injured and receive testimonies. Their bodies had been burned in various areas. The swelling and purulence were visible, especially on the face and limbs. They had difficulty seeing.

They spoke to us quickly and with difficulty: “We were returning from the city after work. We saw two planes coming close to us. One of them got very close and fired a missile and we flew from the car. Some were still alive, and wanted to flee, but the plane fired another missile to kill those who were not yet dead from the first. The flame and the gases surrounded us from all sides and our bodies were burned.” One of the surviving victims continued: “The plane came very close to us, which enabled them with all certainty to see us and confirm to them that we were civilians and that we had children and women with us.” Another added: “Why did they do this to us? Why do Americans want to kill us? Are we not people like they are?”

Because of the lack of adequate medical care for their conditions, they were transferred to Egypt for treatment. Several days after the transfer, one of the injured,

Muhammad Abduh Jarallah, died from his wounds. The rest returned to Yemen because they ran out of funds and were unable to pursue the treatment they needed.

At a meeting of the families of the victims organized by HOOD and Alkarama, the families said that American drones have been hovering above their region night and day for a year, causing terror and fear among residents. On September 12, Hood asked the prosecutor to investigate the strikes. To date, the prosecutor has declined to open any investigation.

December 24, 2012, Al-Shihr

Drone attacks in the city of Al-Shihr in the province of Hadramout in December 2012 are still the subject of significant discussion by residents. The effects of the attacks are still evident in the life of the people.

At 6:30 p.m. on December 24, 2012, there were three consecutive violent explosions, shaking areas of the city of Al-Shihr. Several Hellfire missiles fired from drones struck a public soccer field in the middle of the city, killing at least four people. The identities of some of the victims are unknown, since the missiles eviscerated their bodies.

On the other side of the field, there was a group of children playing soccer. One of them, Hamzah Hussayn bin Dahman, age 16, suffered a severe psychological shock during the attack. Hamzah's father, Hussayn Sa'id bin Abdullah bin Dahman, said: When he returned home, Hamzah was shaking with fear. He spoke with difficulty and said he saw people dismembered and bleeding, and then he fainted.

Since the strike Hamzah has not been the same physically or mentally. His father has traveled abroad, to Egypt and Jordan, to seek medical tests and consultations. He said: "I had no other choice but to travel abroad to treat my son. I sold everything I had to restore my child's health so he could return to school. My wife sold her jewelry and we borrowed huge amounts of money. What happened to my son was the result of the American attack, and I demand both the American government and the Yemeni government to help with my son's treatment. Now we live in a state of fear and worry for our lives, and fear any complications or permanent disability, and I fear as well that the mother will suffer from complications out of fear for her son. Until now, the family has not been offered aid of any kind."

January 23, 2013, outside of Sana'a

On January 23, 2013, an American drone fired missiles at a car traveling between the Jihanah and Sanhan districts in the Sana'a province. The strike killed all of its four passengers.

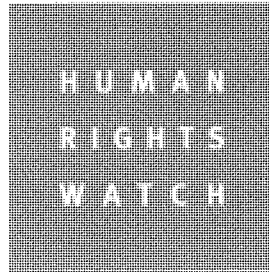
The driver of the car, Salim Hussayn Ahmad Jamil, age 20, was accompanied by one of his relatives, Ali Ali Salih Al-Qawili, age 33, who worked as a teacher in the

Khalid bin Al-Walid school in the region of Qawil. The two were driving when two other men, whose identities they did not know, stopped and asked if they could pay for a ride to a nearby region. The drone attack occurred along the way.

The Ministry of the Interior confirmed that Ali Ali Salih Al-Qawili was one of the dead and had been a schoolteacher. Al-Qawili's brother gave HOOD the attendance slip that confirmed his brother's presence at the school continuously, and particularly on the day of the attack. He had signed in and out of school on the day he died.

* * *

The foregoing accounts are just some of the stories of those impacted most by U.S. targeted killing operations in Yemen. The submitting organizations hope that these accounts will inform the Subcommittee's inquiry into the legality, morality and wisdom of the Administration's current positions and program.



HRW.org

Written Statement of Letta Tayler
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Human Rights Watch

to

US Senate, Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights and Human Rights

Hearing on "Drone Wars: The Constitutional and Counterterrorism
Implications of Targeted Killing"

April 23, 2013

Chairman Durbin, Ranking Member Cruz, and other members of the subcommittee, thank you for the opportunity to submit a statement for today's hearing on targeted killings. My name is Letta Tayler and I am the senior terrorism and counterterrorism researcher at Human Rights Watch, an independent organization dedicated to promoting and protecting human rights around the globe. From February 2011 to February 2013, I also was our organization's lead researcher on Yemen, the geographic base of Al Qaeda in the Arabian Peninsula (AQAP), which the Obama administration views as one of the most serious threats to US national security. I have visited Yemen four times in the past year and interviewed scores of Yemenis about their security concerns, including US targeted killings on Yemeni soil.

My written testimony will focus on an air strike in central Yemen in September 2012 that killed 12 civilians but not the apparent target, who was not even nearby. My findings on that attack were published in December 2012 in *Foreign Policy*.¹ The attack serves as a case study of the perils, both legal and strategic, of the US insistence on cloaking its targeted killing program in secrecy. Not only is the US government failing to fully acknowledge civilian deaths in targeting operations, but its failure to do so is alienating local populations.

Air Strike Kills 12 Civilians

The attack took place outside of Radaa, a hilltop city 100 miles southeast of Yemen's capital, Sanaa, in an area largely outside the central government's control. In January 2012, al Qaeda militants seized Radaa and held it for 10 days until local sheikhs chased them out. Many of the militants retreated into nearby villages. Since that time, US aerial drones and US or Yemeni warplanes reportedly carried out at least 10 deadly strikes on alleged Islamist militants in Radaa and surrounding hamlets, and surveillance drones have circled the area daily.

Shortly after 4 p.m. on September 2, 2012, a manned warplane or a drone struck a sport utility vehicle traveling north from Radaa along an isolated road. Quoting unnamed Yemeni officials, local and international media initially described the victims as "al Qaeda militants." But after relatives of the victims threatened to bring their loved ones' charred bodies to the doors of Yemen's president, the country's official news agency, Saba, called the strike an "accident" and admitted the awful truth: The 12 people killed were civilians. One victim was a pregnant woman. Three were children.

In December 2012, *The Washington Post* published a report quoting unnamed US officials in Washington as saying a US military aircraft, "either a drone or a fixed-wing airplane," fired on the vehicle.² Seven months later, that sentence remains the only US admission of responsibility for the attack, despite requests for comment from international media and nongovernmental organizations including Human Rights Watch.

¹ See "Anatomy of an Air Strike Gone Wrong," *Foreignpolicy.com*, December 26, 2012, <http://www.hrw.org/news/2012/12/26/anatomy-air-attack-gone-wrong>.

² Sudarsan Raghavan, "When U.S. drones kill civilians, Yemen's government tries to conceal it," *The Washington Post*, December 24, 2012, http://www.washingtonpost.com/world/middle_east/when-us-drones-kill-civilians-yemens-government-tries-to-conceal-it/2012/12/24/bd4d7ac2-486d-11e2-8af9-9b50cb4605a7_story_1.html.

During a research trip to Yemen last September and October, I interviewed four witnesses whose relatives and friends were among those killed in the strike, as well as several Yemeni human rights activists and lawyers who had investigated the incident. I also reviewed videos and photos of the scene taken immediately after the attack.

All 12 victims were residents of Sabool, a cluster of 120 brick-and-mud homes six miles north of Radaa that, according to residents and local journalists, has no electricity, no paved roads, no schools, and no hospitals. The only livelihood in Sabool is farming for qat, a narcotic leaf that is legal and widely chewed in Yemen.

All morning and afternoon on September 2, two drones had been circling over Sabool, the witnesses told me. Shortly before 4 p.m., three of the witnesses said, two warplanes also swooped into the area.

"I heard a very loud noise, like thunder," said Sami al-Ezzi, a farmer who was working in his fields in Sabool. "I looked up and saw two warplanes. One was firing missiles."

Rushing to the scene, about 1½ miles from Sabool, residents found a horrific sight: the battered Toyota Land Cruiser that had served as the daily shuttle service between Sabool and Radaa lay on its side in flames. Charred bodies that had been flung from the vehicle lay on the road, dusted with white powder—flour and sugar, the witnesses said, that the victims were bringing home from market when the aircraft attacked.

"About four people were without heads. Many lost their hands and legs," said Nawaf Massoud Awadh, a sheikh from Sabool who was among the first to arrive at the scene. "These were our relatives and friends."

Two victims were a mother and daughter, clutched in a lifeless embrace. "The bodies were charred like coal. I could not recognize the faces," said Ahmed al-Sabooli, a 22-year-old farmer. Moving in closer, Sabooli realized that the woman and daughter were his mother and 10-year-old sister, and that his father also was among the dead. "I recognized my mother because she was still holding my sister in her lap," Sabooli said. "That is when I cried."

Seven of those killed were breadwinners; in Sabooli's family alone, six of his siblings are too young to fend for themselves. Yet the families of the victims have received no compensation, much less a public apology, from the US government. "Now we have 50 people in our village with no one to care for them," sheikh Awadh told me. "Who will raise them? Who will educate them? Who will take care of their needs?"

The videos depicted chaos at the scene.

"Push! Push!" "Open the door!" residents are heard shouting in one video. Seeking to extinguish the flames, they urged, "Bring sand!"

Two men in the video are heard exclaiming that a warplane with “two exhausts in the back” -- presumably twin engines -- fired munitions at the vehicle while other aircraft were circling. The men's agitated exchanges underscore the uncertainty in Yemen over who is conducting such attacks.

“It's our government, it's our government,” one man says.

“It's America, it's America,” the other responds.

One video shows a man pulling a Kalashnikov assault rifle from the wreckage and throwing it aside. This may seem incriminating, but Yemen is among the world's most armed countries, and it is common for men to carry assault rifles in tribal areas such as Sabool and Radaa.

The group of villagers was returning home from the local market town. Sabooli's mother, for example, had gone to Radaa with her husband for a doctor's appointment; they had brought their daughter along for the ride. Most of the other passengers were farmers who had gone to Radaa to sell their crops.

Targeted Militant Not in Vehicle

Local and international media quoted unnamed Yemeni government officials as saying the attack's intended target was Abduraouf al-Dahab, an alleged al Qaeda militant whose brother had led the January takeover of Radaa. Dahab is from Manasseh, a village about nine miles north of Radaa. The SUV was struck as it approached an intersection where one road led to Sabool and the other to Manasseh. But Dahab was not inside the Land Cruiser or anywhere in sight. Several subsequent drone strikes have reportedly failed to kill Dahab.³

Evidence from the site does not clarify whether the villagers were killed by a drone or a fighter jet, or what role the Yemeni authorities may have played in the strike. Two witnesses told me they saw the warplanes fire munitions that they thought were bombs and missiles. Two other witnesses told me they saw a black tail fin near the burning SUV, and that would-be rescuers used it to try to ram open a door of the vehicle. A black tail fin is typical of a Hellfire, a US missile that can be fired by either drones or fighter jets. The shrapnel that witnesses brought me from the site is more consistent with the type of damage caused by a bomb -- which would point to an attack by manned jets.

Initial media reports quoted Yemeni officials as saying Yemeni warplanes carried out the attack. But, as a 2010 US diplomatic cable released by Wikileaks reveals, Yemen has previously covered up for US targeted killings gone awry. According to the cable, then-President Ali Abdullah Saleh told Gen. David Petraeus, who was then the head of US Central Command, that “We'll continue saying the bombs are ours, not yours.”⁴ The two officials were discussing a US air strike in December 2009 that killed 41 civilians in southern Abyan province.

³ See, for example, Iona Craig, “Yemen Tribesmen Reportedly in Angry Protest Over Drone Campaign,” Times of London, January 5, 2013, <http://www.thetimes.co.uk/tto/news/world/middleeast/article3648934.ece>.

⁴ “General Petraeus' Meeting With Saleh On Security Assistance, Aqap Strikes,” US Embassy Cable, January 4, 2010, <http://wikileaks.org/cable/2010/01/10SANAA4.html>.

The Obama administration maintains that the United States has authority under both domestic and international law to conduct targeted killings because the country is at war with al Qaeda and its affiliates. International law permits targeted killings of enemy fighters in battle zones and of people posing an imminent risk to life in law enforcement situations.⁵ However, US officials have failed to explain how they make this determination in areas that are far from a traditional battlefield.

John Brennan, who was President Obama's chief counterterrorism advisor until his confirmation as Central Intelligence Agency director in March, has said that civilian casualties during targeted killings are "exceedingly rare."⁶ But, citing national security, US officials from President Obama on down have refused to disclose how many militant suspects and civilians have been killed, or the legal basis for placing suspected militants on a "kill list." Nor will the Obama administration provide information on what steps it takes to minimize civilian casualties or investigate attacks in which civilians are killed.

Scant Redress

Governments have an obligation under international law to investigate alleged violations of the laws of war and provide redress for unlawful attacks. In Afghanistan, NATO members -- including the United States -- have recognized the value of compensating civilians for loss of life or other damage, even when the attacks are lawful.

There is no such formal system in Yemen. Indeed, the relatives of those killed on September 2 have fought an uphill battle to gain even the most meager assistance. Distraught relatives and friends had to collect the charred remains of the victims by themselves and drive them to the city morgue in Radaa. Upon reaching the outskirts of the city, troops from the elite Republican Guard blocked their entry for two hours. Then officials at the morgue refused the bodies.

The Sabool villagers spent the night on the streets of Radaa, fending off stray dogs from the corpses spread out on the beds of pickup trucks. The next day, Radaa shopkeepers joined the Sabool residents in blocking the city's main street and threatening to bring the decomposing bodies to the doorstep of President Abdu Rabu Mansour Hadi, who was installed in 2012 with US support and is an outspoken proponent of the targeted killing program.

Within hours, Sheikh Sinan Garoon, the deputy governor of al-Bayda, the province that includes Radaa and Sabool, arrived to pay off victims' relatives the tribal way, with 95 Kalashnikovs and a total of 15 million Yemeni rials -- about \$70,000 -- in burial money. He also promised further compensation, villagers said. "We will give you the guns," Deputy Governor Garoon is seen telling the angry demonstrators in a video obtained by Human Rights Watch. "If you demand blood money, it will be given to you."

⁵ See Human Rights Watch, Q & A: US Targeted Killings and International Law, December 19, 2011, <http://www.hrw.org/news/.../q-us-targeted-killings-and-international-law>.

⁶ US Select Committee on Intelligence, Responses to Pre-Hearing Questions, Nomination of John O. Brennan to be the Director of the Central Intelligence Agency, February 7, 2013, intelligence.senate.gov/130207/prehearing.pdf

In Sanaa, President Hadi announced he would create a special committee to investigate the Radaa attack. But to date the panel has not been formed, and talks on compensation beyond the initial \$70,000 have stalled. “They were toying with us,” sheikh Awadh told me bitterly.

Deputy Governor Garoon told the relatives of those killed that “the government is busy nowadays with more important issues,” Sabooli said. “It’s as if we live in a jungle and the attack was on wild animals -- no one cares.”

Meanwhile, the family of Abdulaoud Dahab, the militant reportedly targeted in the strike, has offered financial assistance to families around Radaa who have lost relatives in targeted killing operations, residents told me.

US Drone Strikes Began in Yemen

Yemen, the poorest country in the Middle East, has a history with what the George W. Bush administration called the “global war on terror.” The Arabian country is not only the base of Al Qaeda in the Arabian Peninsula, it also is the ancestral homeland of Osama bin Laden. The strategic Yemeni port of Aden was the site of al Qaeda’s suicide bombing of the naval vessel *USS Cole* that killed 17 American sailors in 2000.

In 2002, Yemen became the first country in which the US used a drone strike in a targeted killing. That attack killed alleged al Qaeda leader Qaed Salim Sinan al-Harethi, along with five other suspected militants. The United States carried out its next targeted killing in Yemen in 2009 and to date has carried out at least 53 drone strikes and other air attacks there, killing upwards of 300 people, according to the London-based Bureau of Investigative Journalism.⁷ But lack of access to the attack areas, nearly all of which are too dangerous for international media and investigators to visit, makes it impossible to verify the totals or to determine how many of those killed were civilians, and under what circumstances. The same difficulty exists for verifying casualties from US targeted killings in Pakistan and Somalia.

The United States also has provided at least \$290 million in security assistance to Yemen since 2006, most of it for counterterrorism—far more per year than in non-security aid.⁸

The intense US counterterrorism activity in Yemen, combined with an official wall of silence when civilians are killed in targeted killings, has led many Yemeni citizens to conclude that the US views their country only through a security prism and cares nothing for the well-being of its people. This view gained additional currency during Yemen’s largely peaceful uprising against then-president Saleh in 2011; US officials had viewed Saleh as a critical if fickle counterterrorism ally and initially appeared reluctant to support his resignation.

⁷ See The Bureau of Investigative Journalism’s “Covert Drone War” web page, <http://www.thebureauinvestigates.com/category/projects/drones/>.

⁸ “Yemen: Background and US Relations,” Congressional Research Service, November 2012, <https://www.fas.org/spp/crs/mideast/RL34170.pdf>, p. 15.

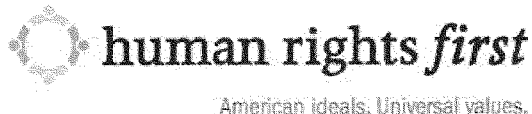
In 2012, after Saleh resigned from the presidency, the US government for the first time began providing more economic and humanitarian assistance than covert security aid to Yemen--\$198 million compared to \$158--in counterterrorism and other security assistance.⁹ But for those civilians affected by the US targeted killing policy, no amount of humanitarian assistance is likely to change minds.

Need for Transparency, Accountability

The US needs to come clean about whom it is killing in Yemen and other countries where it is carrying out targeted killings. It should ensure its rulebook complies with international law, including the obligation to investigate alleged unlawful attacks, hold to account those responsible for unlawful attacks, and provide adequate redress to those it has wrongfully killed. The Obama administration is reportedly poised to shift command of targeted killings from the CIA to the military; while this is one important step, it is not enough. Most strikes in Yemen, for example, are carried out by the Pentagon's Joint Special Operations Command, often with CIA input, yet they are cloaked in as much or almost the same level of secrecy and lack of accountability as strikes in Pakistan that are carried out by the CIA.

With neither Yemeni nor US authorities taking responsibility for targeted killings that go wrong, Yemenis I spoke with blame both countries. As Sabooli, the farmer who lost his parents and little sister in the strike outside Radaa told me: "Both the Yemeni government and the American government killed my family and my villagers. Both of them should be brought to justice."

⁹ "U.S. Assistance to Yemen," US State Department fact sheet, March 7, 2013, <http://www.state.gov/r/pa/prs/ps/2013/03/205816.htm>.



STATEMENT FOR THE RECORD

On

**Drone Wars: The Constitutional and Counterterrorism Implications of
Targeted Killing**

Submitted to the
Subcommittee on the Constitution, Civil Rights and Human Rights
Senate Judiciary Committee
April 23, 2013

Mr. Chairman and Members of the Subcommittee:

We commend the Subcommittee on the Constitution, Civil Rights and Human Rights for holding this important oversight hearing on targeted killing by drones and whether U.S. policy adheres to the rule of law. In his 2013 State of the Union address, President Obama pledged "to engage with Congress to ensure not only that our targeting, detention, and prosecution of terrorists remains consistent with our laws and system of checks and balances, but that our efforts are even more transparent to the American people and to the world."¹ The issue of targeted killing by drones is overdue for a serious examination of the rules the United States is applying when using lethal force. This hearing is one of the most serious efforts to do that to date. We appreciate your leadership, Mr. Chairman, and thank you for the invitation to submit our testimony.

Human Rights First is an independent advocacy organization that challenges America to live up to its ideals. We are a non-profit, nonpartisan international human rights organization based in New York and Washington D.C. To maintain our independence, we accept no government funding. For over 30 years, we've built bipartisan coalitions with frontline activists and lawyers to tackle issues that demand American leadership. Since 9/11, we have worked with retired generals and admirals, law enforcement officials, professional interrogators, national security organizations and civil liberties groups to promote security policies that respect the rule of law and human rights.

As the most forwardly deployed military force in the world, the United States has a strong national interest in maintaining the integrity of our Constitution and adherence to international law. To the extent that its targeted killing program fails to maintain—and be seen to maintain—fidelity to these rules, the United States risks undermining a system of rules that has protected our nation and military for decades. How the U.S. operates and publicly explains its targeted killing program

¹ Text of President Obama's State of the Union address available at: <http://www.whitehouse.gov/the-press-office/2013/02/12/remarks-president-state-union-address>.

will have far-reaching consequences. For example, the manufacture and sale of unmanned aerial vehicles (UAVs) is an increasingly global industry and drone technology is not prohibitively complicated. More than 70 countries already possess UAVs—including Russia, Syria and Libya—and we know that others are in the process of acquiring them.²

As then-White House counterterrorism chief John Brennan stated: the United States is "establishing precedents that other nations may follow, and not all of them will be nations that share our interests or the premium we put on protecting human life, including innocent civilians."³

The Senate has a solemn responsibility to address threats facing our nation. Those threats are real and complex. The United States must constantly assess how to identify, mitigate, prepare for and respond to threats to our national security. This statement outlines the:

- (1) lawful use of lethal force inside and outside an armed conflict;
- (2) policy and legal concerns raised by current U.S. drone operations; and
- (3) steps the administration can take to bring drone operations into compliance with the rule of law.

I. Targeted Killing is Lawful in an Armed Conflict or in The Face of an Imminent Threat

Drones in Armed Conflict. There is nothing improper about drones, per se; drones are simply a weapons platform. Nor is there anything surprising about the use of lethal force in an armed conflict so long as the targeted killing complies with the rules of international humanitarian law, also known as the law of armed conflict (IHL/LOAC). In armed conflict, it is permissible to target enemy armed forces at any time and civilians while they are directly participating in hostilities. This authority embodies the fundamental principle of distinction between combatants and civilians, and is tempered by the additional principles of proportionality and precautions. Under the principle of proportionality, attacks may not proceed if they are likely to cause civilian casualties that are clearly excessive in relation to the military advantage gained. Under the principle of precautions, the attacking party is obligated to take measures to minimize civilian harm in advance of an attack.

Drones Outside An Armed Conflict To Repel An Imminent Threat. The President has the authority to use lethal force outside an armed conflict to keep Americans safe in response to an imminent threat. The executive's authority under Article II of the United States Constitution and under international law is not unfettered, however. International law restricts the use of lethal force outside of armed conflict to situations in which such force is a last resort and in response to an imminent threat that poses a substantial risk to human life.⁴ Drones may lawfully be used to conduct targeted killings outside of an armed conflict, therefore, only when the threat presented by the target is imminent and cannot be mitigated by other non-lethal means.

² Peter Bergen and Jennifer Rowland, *A Dangerous New World of Drones*, CNN, October 2, 2012, available at: <http://www.cnn.com/2012/10/01/opinion/bergen-world-of-drones>.

³ Remarks of John Brennan, Former Assistant to the President for Homeland Security and Counterterrorism, Remarks at Wilson Center on April 30, 2012, available at: <http://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy>.

⁴ Study on Targeted Killings, Human Rights Council, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, UN Doc A.HRC.14.24.Add.6, May, 28 2010.

II. Policy Concerns Regarding Current U.S. Targeted Killing Operations

Drones may make Americans less safe in the long run.

It is not clear that the current broad targeted killing policy serves U.S. long-term strategic interests in combating international terrorism. Although it has been reported that some high-level operational leaders of al Qaeda have been killed in drone attacks, studies show that the vast majority of the thousands of victims of U.S. drones are not high-level terrorist leaders.⁵

National security analysts and former U.S. military officials increasingly argue that the tactical gains of killing such a large number of suspected terrorists are outweighed by the substantial costs of the targeted killing program, including growing anti-American sentiment and recruiting support for al Qaeda.

For example, Michael A. Sheehan, Assistant Secretary of Defense for Special Operations and Low-Intensity Conflict, said in January: "In the long term, we recognize that we can't solely rely on precision strikes to defeat enemy networks and foster the kind of stability we need in these regions," he said. Such stability can best be established by aiding friends, partners and allies.⁶

Robert Grenier, former director of the CIA's counter-terrorism center, told the *Guardian* last June:

We have gone a long way down the road of creating a situation where we are creating more enemies than we are removing from the battlefield. That brings you to a place where young men [in Yemen], who are typically armed, are in the same area and may hold these militants in a certain form of high regard. If you strike them indiscriminately you are running the risk of creating a terrific amount of popular anger. They have tribes and clans and large families. Now all of a sudden you have a big problem ... I am very concerned about the creation of a larger terrorist haven in Yemen.⁷

General Stanley McChrystal has said: "What scares me about drone strikes is how they are perceived around the world. The resentment created by American use of unmanned strikes ... is much greater than the average American appreciates."⁸

General James E. Cartwright, former vice chairman of the Joint Chiefs of Staff, similarly acknowledged in March: "We're seeing that blowback. If you're trying to kill your way to a

⁵ The latest such study was reported by McClatchy Newspapers, available at:

<http://www.mcclatchydc.com/2013/04/09/188062/obamas-drone-war-kills-others.html>.

⁶ Karen Parrish, 'Small-footprint' Operations Effective, Official Says, American Forces Press Service,

January 31, 2013, available at: <http://www.defense.gov/news/newsarticle.aspx?id=119150>.

⁷ Paul Harris, *Drone attacks create terrorist safe havens, warns former CIA official*, The Guardian, June 5, 2012, available at: <http://guardiannews.com/world/2012/jun/05/al-qaida-drone-attacks-too-broad>.

⁸ David Alexander, *Retired general cautions against overuse of "hated" drones*, Reuters, January 7, 2013, available at: <http://www.reuters.com/article/2013/01/07/us-usa-afghanistan-mcchrystal-idUSBRE90608Q20130107>.

solution, no matter how precise you are, you're going to upset people even if they're not targeted."⁹

The broad targeted killing program has already strained U.S. relations with its allies and thereby impeded the flow of important intelligence about terrorist operations."¹⁰

Drones have killed thousands of individuals, including many civilians. The Obama Administration has dramatically escalated targeted killing by drones as a central feature of its counterterrorism response. Senator Lindsey Graham said in February 2013 that the United States has killed 4,700 individuals with drone strikes.¹¹ While the U.S. government does not report the number of deaths from drone strikes, independent groups report that 20–25 percent of deaths caused by drones are civilian casualties.¹² This large number of civilian casualties stands in stark contrast to administration claims that no or few civilians have been killed.¹³

Drones may be the tail wagging the dog of war.

The United States has ended the war in Iraq, and is ending the war in Afghanistan. The question now, more than a decade after the attacks of 9/11, is whether an armed conflict exists beyond the end of combat operations in Afghanistan. The question is a critical one because the laws governing lethal force differ depending on whether the United States is at war, or not.

For hostilities between a state and an armed group to be considered "armed conflict" under international law, they must be conducted by an organized armed group, for a prolonged period of time, and reach a level of intensity that distinguishes them from sporadic acts of violence or low-level domestic disturbances.

The administration has never demonstrated that groups such as al Qaeda in the Arabian Peninsula (AQAP), al-Shabab in Somalia, or groups in Algeria, Libya or Mali are centrally organized groups, engaging in attacks against the United States that reach a level of intensity that distinguishes them from sporadic acts of violence or low-level domestic disturbances.

As former Pentagon General Counsel Jeh Johnson recently said, we may be approaching a "tipping point" where al Qaeda is no longer capable of strategic attacks against the United States and therefore the United States cannot claim to be in an armed conflict with al Qaeda.¹⁴ Unlike al Qaeda or the Taliban in Afghanistan, groups in Libya, Mali, Syria, Iraq, or Somalia—where the U.S. does not have troops on the ground—do not appear to be engaged in an armed conflict with the United States. Using wartime lethal targeting rules in situations that do not amount to armed

⁹ Mark Mazzetti and Scott Shane, *As New Drone Policy Is Weighed, Few Practical Effects Are Seen*, March 21, 2013, available at: <http://www.nytimes.com/2013/03/22/us/influential-ex-aide-to-obama-voices-concern-on-drone-strikes.html>.

¹⁰ David Alexander, *Retired general cautions against overuse of "hated" drones*, Reuters, January 7, 2013, available at: <http://www.reuters.com/article/2013/01/07/us-usa-afghanistan-mcchrystal-idUSBRE90608O20130107>.

¹¹ Olivier Knox, *Drones have killed 4,700, U.S. senator says*, Yahoo! News, February 21, 2013, available at: <http://news.yahoo.com/blogs/ticket/drones-killed-4-700-u-senator-says-141143752--politics.html>.

¹² See Bureau of Investigative Journalism, *Covert Drone War Casualty Estimates*, available at: <http://www.thebureauinvestigates.com/category/projects/drone-data/>.

¹³ Ed Pilkington, *Does Obama's 'single-digit' civilian death claim stand up to scrutiny?*, The Guardian, February 7, 2013, available at: <http://www.guardian.co.uk/world/2013/feb/07/drones-obama-single-digit-civilian-deaths>.

¹⁴ Jeh Johnson, *Former General Counsel of the U.S. Department of Defense, Remarks at the Oxford Union* on November 30, 2012, available at: <http://www.lawfareblog.com/2012/11/jeh-johnson-speech-at-the-oxford-union/>.

conflict would be inconsistent with the requirements of international humanitarian law (the law of armed conflict), could undermine counterterrorism cooperation, sets a dangerous precedent and promotes backlash against broader U.S. strategic interests.

III. Legal Concerns Presented By Current U.S. Targeted Killing Operations

While targeted killing is legal in some circumstances, the administration's public comments about the drone operations have raised serious legal concerns.

The U.S. government may have redefined the international standard for what constitutes an imminent threat.

U.S. officials have claimed targeted killings are justified as self-defense responding to an imminent threat, but have referred to a "flexible" or "elongated" concept of imminence,¹⁵ without adequately explaining what that means or how that complies with the requirements of international law.

In a white paper leaked to *NBC News* in February 2013, for example, the Department of Justice adopts what it calls a "broader concept of imminence" that has no basis in law.¹⁶ According to the white paper, an imminent threat need be neither immediate nor specific.¹⁷ This is a dangerous, unprecedented and unwarranted expansion of widely-accepted understandings of international law.

The U.S. Has Broadened The Definition of Targetable Enemy.

According to former senior counterterrorism advisor and current Director of the CIA John Brennan, the Obama Administration takes the view that all "members" of al Qaeda, the Taliban, or "associated forces" are targetable, just as commanders of the enemies' armed forces were targetable during World War II.¹⁸ IHL does not permit "members" of terrorist groups to be lethally targeted based on their membership status alone. Couriers, financiers, and cooks, for example, may be "members" of al Qaeda, but such individuals are not lawfully subject to attack in armed conflict unless and until they directly participate in hostilities or assume a continuous combat function in an organized armed group.¹⁹ To claim the U.S. may lawfully attack all such "members" not only misrepresents the law but sets an extremely dangerous precedent that could lead to dramatic expansion of armed conflict around the world.

The administration alternatively asserts that, as a matter of policy, it targets only "operational leaders" of terrorist groups who pose an imminent threat, whether or not in the context of an

¹⁵ John Brennan, Former Assistant to the President for Homeland Security and Counterterrorism, Remarks at Harvard Law School on September 16, 2011, available at: <http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an>; Daniel Klaidman, *Kill or Capture: The War on Terror and the Soul of the Obama Presidency*, quoting former State Department legal advisor Harold Koh.

¹⁶ White paper is available online at:

http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf.

¹⁷ See *id.*

¹⁸ Brennan, *supra* note 3.

¹⁹ Int'l Committee of the Red Cross, Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law, Vol. 90/Number 872, December 2008.

armed conflict.²⁰ But it has not made clear how it determines whether an individual is an “operational leader.” Moreover, the Department of Justice white paper defines an imminent threat based not on the actual imminence of the threat, but on the “relevant window of opportunity”²¹ to kill the target, assuming that the target is “continually plotting attacks against the United States” even if the U.S. government has no evidence of any particular plot being hatched. This interpretation suggests that the United States is making targeting decisions based on future predictions that it cannot reasonably make, and is using an overly elastic interpretation of the law to justify targeting based on a standing “kill list.”²² Such a list by its very nature cannot reliably identify threats that are “imminent” and therefore cannot be a legitimate basis for targeting outside of an armed conflict.

One of the most troubling aspects of the targeted killing program is the perception, confirmed by administration officials in news reports, that the administration treats all military-age males within a strike zone as “combatants,”²³ irrespective of whether these individuals have been determined to be either members of enemy forces or directly participating in hostilities. Such a practice is unlawful; IHL requires that civilians be distinguished from combatants and requires positive identification of individuals as valid military objectives prior to commencing a strike. In addition, IHL prohibits targeting when the anticipated civilian casualties would be disproportionate to the military gain associated with the strike. Presuming that all military-age males are combatants seriously compromises any attempt to comply with the IHL principle of proportionality. It also undercounts civilian casualties from the targeted killing program, American values do not favor collective punishment or blanket classifications to dole punishment and justice

The U.S. appears to be undercounting civilian casualties by making unwarranted assumptions that those killed were combatants.

The government has not provided any information about civilian casualties, other than to say that they do not exist or are extremely rare. The confusion surrounding this issue may be due in part to the government's failure to make clear its definition of a “civilian.” Instead, government sources speak of “militant” deaths in a manner that appears to presume targetability of the victims without providing any information either before or after a strike demonstrating that the victims were in fact targetable.

The dispute highlights the need for increased transparency regarding both the number of unintended deaths or “collateral damage” resulting from targeted killing operations, and how the government determines who is a “civilian” and who is a “militant,” a term that has no meaning in international law, both before and after a strike. In general, the United States should assess its own level of transparency about the program against what it would expect from other governments, including those who don't share U.S. interests or commitment to protecting human rights.

²⁰ DOJ white paper, *supra* note 16.

²¹ *See id.*

²² Jo Becker & Scott Shane, *Secret ‘Kill List’ Proves a Test of Obama’s Principles and Will*, N.Y. Times, May 29, 2012, available at: <http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?pagewanted=all>.

²³ *See id.*

IV. **Recommendations**

Congress should demand that the administration make public its drone policy. Congress has the responsibility to oversee the administration's targeted killing program and ensure the sort of transparency that is critical to U.S. legitimacy. In particular, Congress should press the Administration to publicly release, with as few redactions as possible, all Justice Department and CIA memoranda setting forth those agencies' legal analysis of and justification for the targeted killing program.

Relevant Congressional committees, including the judiciary committee, should seek answers that demonstrate that the administration understands the legal rules for lethal force in and outside an armed conflict. These committees should ask the administration to testify about its interpretation of the relevant international laws governing targeted killing. Administration officials should specifically be asked whether they can testify that the administration agrees that:

- a) In armed conflict, the United States will only target members of enemy armed forces or civilians while they are directly participating in hostilities, and only in compliance with the principles of proportionality and military necessity; and
- b) Outside of armed conflict, the United States will use lethal force only as a last resort, in response to an imminent threat that poses a substantial risk to human life that cannot be otherwise ameliorated.

A Secret Drone Court Is Not The Answer. One proposal to manage the targeted killing program, which we do not recommend, has been to create a secret court, similar to the court created by the Foreign Intelligence Surveillance Act (FISA), to sanction targeted killings in advance. Former Pentagon General Counsel Jeh Johnson and others have expressed deep skepticism about recent proposals, as Johnson noted, "courts exist to resolve cases and controversies between parties, not to issue death warrants based on classified, *ex parte* submissions."²⁴ As retired federal judge retired federal Judge James Robertson put it recently: "That's not the business of judges to decide without any adversary party to sign a death warrant for somebody who is on foreign soil, for anybody, but certainly not for an American citizen on foreign soil."

Human Rights First believes such a court would likely be unconstitutional because it would violate the separation of powers and would be asked to render advisory opinions rather than rule on actual cases and controversies. Such a court would also give a patina of legitimacy to a ruling for summary execution following a one-sided argument.

In addition to the constitutional problems, the drone court would undermine national security. Lethal force is appropriate under the laws of armed conflict, and no court should be asked to second-guess a commander's decision. Outside an armed conflict, the Constitution authorizes the President to defend Americans with lethal force only in the face of an imminent threat when no other feasible means to disrupt the threat is available. When the threat is imminent, there is by definition insufficient time to seek judicial review. For these reasons, adding a layer requirement

²⁴ Jeh Johnson, Former Department of Defense General Counsel, Remarks at Fordham Law School on March 18, 2013, available at: <http://www.lawfareblog.com/2013/03/jeh-johnson-speech-on-a-drone-court-some-pros-and-cons/>.

of judicial process is impractical and would likely encourage the use of lethal force in situations where the threat is not actually imminent.

Courts Should Review Liability For Unlawful Killings After the Fact. On the other hand, an Article III federal court could provide meaningful judicial review of targeting decisions after a strike, if claims for liability for unlawful killings are brought by survivors. To provide meaningful judicial review of the program without hampering the President's ability to defend the United States, Congress should also pass legislation to prevent the Department of Justice from asserting the state secrets privilege or otherwise arguing to a court that legal claims of unlawful killings are non-justiciable in order to prevent post-targeting liability cases alleging human rights or constitutional violations from being heard on their merits. As CIA Director John Brennan has said: "I think the rule should be that if we're going to take actions overseas that result in the deaths of people, the United States should take responsibility for that."²⁵ Congress should make sure that the administration actually follows that rule.

Congress should demand that all reasonable efforts are being made to protect and compensate civilians. Absent post-strike judicial review, Congress should insist that the administration identify the specific measures taken and procedures in place by both the Department of Defense and the CIA to protect civilians, conduct post-strike casualty assessments, and to provide compensation, when appropriate, to civilians and communities who are harmed by targeted killings. This is a standard practice in kinetic operations that has not been extended to drone strikes.

V. **Conclusion**

Congress should press the administration to do more to explain the targeted killing program and its legal basis. When those policies are transparent, Congress, in its oversight role, has the responsibility to assess whether they are effective within the full range of U.S. counterterrorism efforts. It is also imperative to examine the global precedent that the United States is setting and whether these are policies we are willing to live with. While it is understandable that elements of the U.S. government's strategy for targeted killing will be classified, it is in the national interest that the government be more transparent about policy considerations governing its use as well as its legal justification, and that the program be subject to regular oversight. Furthermore, it is in U.S. national security interests to communicate clearly the rules of engagement and that those rules aim to minimize unintended collateral damage.

²⁵ Conor Friedersdorf, *The Targeted-Killing Czar's Powerful Case Against the Drone War*, The Atlantic, October 26, 2012, available at: <http://www.theatlantic.com/politics/archive/2012/10/the-targeted-killing-czars-powerful-case-against-the-drone-war/264142/>.

April 20, 2013

Dear Senator Durbin,

My name is Mary A. Wright. I served in the US Army/Army Reserves for 29 years and retired as a Colonel. I also served 16 years as a U.S. Diplomat in U.S. Embassies in Nicaragua, Grenada, Somalia, Uzbekistan, Kyrgyzstan, Sierra Leone, Micronesia and Mongolia. I was on the small State Department team that reopened the U.S. Embassy in Kabul, Afghanistan in December, 2001. I was Deputy Chief of Mission of the last four U.S. Embassies.

I was one of three U.S. government employees who resigned in March, 2003 in opposition to the Iraq war.

Having served almost three decades in the U.S. military, I am very concerned about the use of weaponized drones for targeted killings and assassinations.

I firmly believe the targeted killings, signature strikes and by name assassinations in which the President of the United States becomes the prosecutor, judge, jury and executioner of even American citizens violates our own laws and endangers our national security.

I believe the rationale that using drones will prevent U.S. casualties is deeply and fatally flawed. More U.S. military were killed last year in Afghanistan by Afghan soldiers than the U.S. was training and equipping than by the Taliban and al Qaeda. My question is--why?

I believe one of the most probable answers will be that many of the Afghans the U.S. is training come from the border area of Afghanistan and Pakistan where drone strikes are most common. I believe that those Afghan soldiers who have killed U.S. soldiers have had family members who have been killed by U.S. drones—family members who are not militants, but mothers, children, elderly relatives.

We know that the Pakistani-American who attempted to blow up Times Square several years ago with explosives in his car told law enforcement officers that he was fed up with the American drones killing Pakistanis.

We also know that the CIA's agent into al Qaeda, a Jordanian medical doctor who turned double agent and became a suicide bomber who blew himself up and killed eight senior CIA officials in Afghanistan, left a letter with his wife in Jordan that he was horrified by the carnage wrecked by U.S. drones.

Time will reveal why the two young men exploded the bombs at the Boston Marathon, but I would not be surprised that they too were outraged by the U.S. assassin drone program.

I travelled to Pakistan in October, 2013 as a part of a U.S. citizen diplomacy delegation. Our delegation talked with surviving family members of U.S. drone attacks who stated that U.S. drones have killed hundreds of civilians. Pakistani polls reveal that 95% of the Pakistani population is angry with the U.S. for using drones to kill their fellow citizens.

As a retired U.S. Army Colonel with 29 years in the U.S. military, I strongly request that the Congress rein in the administration's use of assassin drones for the safety and security of our country. As a minimum, the public has a right to see the memoranda that authorize these assassin drone strikes.

And finally, as the Congress holds hearings on the non-military use of drones, I hope Congress will protect what little is left of our privacy. Congressional legislation and executive orders allowing the National Security Agency to have access to our cellphone conversations and emails have pretty well gutted our right to privacy.

Constant surveillance of the population by drones will effectively complete the actions needed for a police state in our country.

Please help stop the extraordinary curtailments of civil liberties since 9/11, the militarization of our society in general and the making of a police state written about in fiction books.

Sadly,

Mary A. Wright

Honolulu, HI 96826



**MUSLIM PUBLIC AFFAIRS COUNCIL
STATEMENT FOR THE RECORD**

**Hearing on Drone Wars: The Constitutional and Counterterrorism Implications of
Targeted Killing**

**SENATE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS and HUMAN RIGHTS**

UNITED STATES SENATE

APRIL 23, 2013

Chairman Durbin, Ranking Member Cruz and members of the Subcommittee: We are honored to submit this statement for the record on behalf of the Muslim Public Affairs Council (MPAC) regarding today's hearing on the constitutional and counterterrorism implications of drones. We commend the leadership of the members of the Committee for holding today's hearing, "Drone Wars: The Constitutional and Counterterrorism Implications of Targeted Killing."

MPAC is a faith based American institution working for the integration of Muslims into American pluralism. To that end, we actively strive to affect policy reforms that uphold core American values and preserve constitutionally protected freedoms of all Americans. We have done extensive work on highlighting the use of drones in our counterterrorism and national security efforts. There are real implications in using drone strikes as part of our national security and counterterrorism strategy. As such, we urge Congress to follow your leadership and take increased measures to learn and understand the drone program as well as ensuring transparency regarding the program and establishing up-to-date policy and oversight.



We thank you for holding this critical and first-ever hearing on the implications of the use of drones. The hearing will address the legal and policy issues raised by drone strikes, including the constitutional and statutory authority for targeted killings, the scope of the battlefield in the conflict with Al Qaeda and associated forces, and the international precedent set by U.S. drone policy. This unprecedented hearing will also explore proposals to increase transparency regarding U.S. drone policy and establish a legal architecture to regulate drone strikes.

Unfortunately, the war in Afghanistan is now the longest running war the U.S. military has ever participated in—longer than World War I and World War II combined. Osama bin Laden is dead and al-Qaeda's leadership and organizational structure has been decimated. Its ability to communicate, let alone operate, has been greatly reduced and what remains of the elusive and bankrupt group of individuals has moved to Yemen and the Horn of Africa.

The question we must now ask ourselves is: Is there a real enemy or an elusive one that we keep trying to grasp in the midst of a changing world and region? The U.S. is the only superpower in the world and is protected by the most powerful military in the history of civilization. According to a recent Los Angeles Times op-ed titled *An America Eternally 'at War,'* our military capability will not diminish anytime soon; but will our political and moral leadership hold the same weight?

Yet, the debate among policy-makers and pundits has been whether to send ground troops or to continue with the controversial drone strikes into Afghanistan and Pakistan while trying to determine the most effective tactic against the violence emanating from South Asia.



Our ongoing war in the region is not a conventional war, which is defined by two armies in true military engagement. It is, in fact, asymmetrical warfare.

The lack of a true enemy has revealed President Barack Obama's false choice between launching drone strikes or sending troops. The use of deadly force, which kills more civilians than terrorists, increases anti-American sentiment, hence radicalizing a region that is already battling a social undercurrent that is ripe with anger and hatred. As we have seen since the onslaught of drone attacks, the "collateral damage" of civilian casualties has made it easier for violent extremists to recruit young people who have witnessed more than a decade of destruction of their homes and the killings of their loved ones.

Radicalization through the use of drone attacks is an issue we must face and combat. Similarly, we must increase transparency and establish a legal framework so that we do not allow the enemy to justify their actions based on drone attacks. It is imperative we understand the nuances of the drone program and its repercussions on communities.

Impact of Government Actions

Government actions and political discourse shape the public's perception of maintaining national security while upholding our civil rights. Congress must establish legislation that remains up-to-date with new and emerging technologies such as drones when maintaining our national security.



The drone debate is a highly controversial one within American discourse and especially within the American Muslim community. Unfortunately, the debate tends to be filled with emotion and we thank you, Senator Durbin, for brining facts in and taking emotion out of the debate.

Conclusion

History has shown us the past efforts led by the highest levels of government have been pivotal setting a framework when dealing with new national security programs. We are at a moment in history when national security threats and solutions must identify and respond to our civil liberties as well. Further, Congress must allocate and prioritize federal funding for oversight and initiatives that constantly check the drone program and ensure that legislation is current with technology.

MPAC is heartened by the Subcommittee's leadership in holding this hearing and we are grateful for the opportunity to present our position on the counterterrorism implications from the use of drones.

Thank you again for this opportunity to express the views of the Muslim Public Affairs Council. We welcome the opportunity for further dialogue and discussion about these important issues.



YEMEN POLICY INITIATIVE

Coordinated by the Hariri Center for the Middle East at the Atlantic Council and the Project on Middle East Democracy

The Rafik Hariri Center for the Middle East at the Atlantic Council and the Project on Middle East Democracy (POMED) would like to thank Chairman Durbin and the members of this Subcommittee for convening this important hearing to examine the implications of the use of drones in targeted killings.

While we recognize the Subcommittee will focus on a variety of issues, we are particularly concerned with the use of drones in Yemen. Over the past several years, Yemen has become a haven for al-Qaeda in the Arabian Peninsula (AQAP), now the world's most active al-Qaeda affiliate. The instability following the 2011 Yemeni uprising has strengthened AQAP, leading to greater U.S. involvement in Yemen. While the President has increased economic and humanitarian assistance to Yemen, the most visible shift has been a substantial increase in the use of drones in targeted killings of AQAP leaders.

In 2012, POMED and the Hariri Center launched the Yemen Policy Initiative in order to generate discussion of how the U.S. government can support Yemen's democratic transition while advancing American security interests in the Arabian Peninsula. Our efforts call upon the administration to look beyond acute, short-term threats and instead focus on economic growth, sustainable development, strong institutions, and the rule of law in Yemen.

Last month, we sent a letter to President Obama urging a reorientation of U.S. policy toward Yemen, with a focus on the counterproductive impact of drones. The letter was signed by 31 leading foreign policy experts, including Ambassador Barbara Bodine, former U.S. Ambassador to Yemen; Anne-Marie Slaughter, former Director of Policy Planning at the Department of State; Emile Nakhleh, former Central Intelligence Agency analyst; Ambassador Richard Murphy, former Assistant Secretary of State for Near Eastern and South Asian Affairs; and Wayne White, former Deputy Director for the Department of State's Office of Analysis for the Near East and South Asia, Bureau of Intelligence and Research.

Numerous prominent voices from within the American military establishment have also voiced concerns about the extent to which drone strikes engender anti-Americanism abroad, including General James E. Cartwright, former Vice Chairman of the Joint Chiefs of Staff, and General Stanley McChrystal, former Commander of the International Security Assistance Force (ISAF) in Afghanistan.

The U.S. government's increased reliance on drones undermines our long-term interest in a stable, secure, and sustainable partner in Yemen. A growing body of research indicates that civilian casualties and material damage from drone strikes discredit the central government and engender resentment towards the United States. Where drone strikes have hit civilians, news reports and first-hand accounts increasingly indicate that affected families and villages are demonstrating and chanting against the Yemeni and U.S. governments. This creates fertile ground for new recruits and sympathizers who might provide safe haven or direct support to AQAP and its local affiliate, Ansar al-Sharia. The collateral damage produced by drone strikes, along with the political cost of alienating Yemenis, narrows the political space within which we can cooperate with and help strengthen the Yemeni government.

By sanctioning the expansive use of drones, we believe President Hadi risks undermining the legitimacy of his government. The vast majority of Yemenis likely accept that the Yemeni government must combat violent extremists that have found safe haven in Yemen, but reject U.S. control of this campaign. The U.S. strategy in Yemen is based on the core assumption that a strong and legitimate government is essential to overcome the myriad challenges the country faces. By associating itself with

drone strikes, the Yemeni government unwittingly undercuts its credibility amongst the population. Opposition to drone strikes is becoming a national rallying cry for those distrustful of the central government—from Ansar al-Sharia, to Houthis, to Southerners. We need a strong and reliable government in Yemen in order to effectively counter the real threats that emanate from Yemeni soil. Instead of deploying drones that cause further political and tribal conflict and at times result in civilian casualties, the U.S. government should prioritize efforts to address the underlying causes of extremism and help Yemenis build a sustainable, effective military and security apparatus that can protect citizens throughout the country.

In view of these concerns, we hope that the Subcommittee will broadly consider the implications of the use of drones in targeted killings in Yemen. While the tactical costs and benefits of any given strike are weighed by the Administration, the same degree of attention should be paid to the corrosive political effects of drone strikes. Particular attention must be focused on the effect of strikes on the central government's legitimacy and its ability to cooperate with the United States.

We hope that Congress will continue to push the Administration to develop a more transparent process and robust legal framework to govern the use of drone strikes in Yemen and elsewhere. In addition, we urge policymakers and military planners to take this opportunity to take a serious look at whether drone strikes are effective in achieving long-term US security objectives. Such an assessment should lead to a far more judicious use of drones as one component of a more comprehensive approach that addresses not only acute security threats, but also the political and economic circumstances that give rise to extremists overseas.



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22 April 2013

Senator Dick Durbin
Chairman
Senate Judiciary Subcommittee on the
Constitution, Civil Rights, and Human Rights

Dear Senator Durbin:

Drone Wars: The Constitutional and Counterterrorism Implications of Targeted Killing

Hearing before the Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights

Written Evidence for the Record Submitted by

Stefan Wolff, PhD

Professor of International Security, University of Birmingham, England, UK

I am a political scientist at the Institute for Conflict, Cooperation and Security at the University of Birmingham in England, UK, currently working with my colleagues David Dunn, PhD, and Professor Nicholas Wheeler, PhD, on a publicly funded research project considering the political implication of drone warfare on inter- and intrastate conflicts, with a particular focus on Afghanistan, Pakistan and Yemen.

The issues to be considered at your Hearing on 23 April 2013 – the legal and policy issues raised by drone strikes, the scope of the battlefield in the conflict with Al Qaeda and associated forces, and the international precedent set by U.S. drone policy – are at the heart of our own investigation, and as such I greatly appreciate the opportunity to offer some insights and analysis.

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While there can be no doubt that the national and international legal regulation of the deployment of Unmanned Aerial Vehicles (UAVs, drones) for the purposes of surveillance, monitoring, intelligence gathering, and military strikes is of great importance, it is equally significant in my view to take account of the effectiveness (or lack thereof) of the deployment of drones, especially in relation to their use for targeted killing. In order to account for the effectiveness of drones, clarity needs to be established about the broader strategic objectives in the areas in which drone strikes are carried out, how drone strikes relate to other tools employed for the same purpose, and whether results of the implementation of such a broader strategy can be linked causally to the use of drones. I will thus consider four specific points in the following: (1) What counter-terrorist effects can we plausibly hypothesize for drones to have the context of their deployment for targeted killings? (2) What evidence do we have to substantiate any of these hypothesized effects? (3) What can we infer from this for whether drone warfare is an overall effective tool to increase national and international security? (4) What does this mean for the future national and international legal regulation of drone warfare?

(1) What counter-terrorist effects can we plausibly hypothesize for drones to have the context of their deployment for targeted killings?

The use of drones for targeted killing is but one of a range of purposes for which they can be employed, and drones are only one tool employed for targeted killings. In the cases of Afghanistan, Pakistan, and Yemen, their use is particularly linked to the elimination of terrorist operatives considered actual and potential threats to US and other Western security interests. Drone strikes are less flexible in outcome than special operations (where soldiers on the ground can decide whether to kill or to capture), they thus result in a loss of intelligence that could have gathered from a captured terrorist operative, the degree to which drone strikes are indeed achieving the precision that is claimed by their advocates is debatable given the degree of 'collateral damage' and civilian deaths they have inflicted, thus creating unrealistic, self-defeating expectations that can easily backfire, but they do have the advantage of greater speed of deployability against targets, of greater reach into otherwise inaccessible areas, and crucially of limiting danger to pilots.

In relation to the use of drones for counter-terrorist purposes, among the positive effects would be improved intelligence, surveillance and reconnaissance (ISR) aiding in the discovery and prevention of terrorist plots, the elimination or capture of high-value targets, and the denial of safe areas and

training facilities for terrorist operatives. On the negative side, the most frequently cited unintended effect that can occur instead of, or alongside, possible benefits of using drones in counter-terrorist campaigns, is the enlargement of the pool of potential recruits to terrorist groups as a result of broader resentment among the public.

This latter point is also highly relevant in terms of possible negative effects from the use of drones from the perspective of counter-insurgency, because drones have been, and are, deployed in contexts of a simultaneous insurgency in all countries in which they are currently being used for counter-terrorist purposes. In Afghanistan, the United States has been active in a counter-insurgency campaign against the Taliban as a direct party to this conflict, whereas in Pakistan and Yemen (as well as in Somalia and across the Sahel zone), the US is not officially a party to conflicts between the respective governments and various insurgent forces. In other words, the application of drone strikes does not merely have effects in relation to a counter-terrorism strategy, but it also affects counter-insurgency campaigns, whether pursued directly by the US or by states' governments.

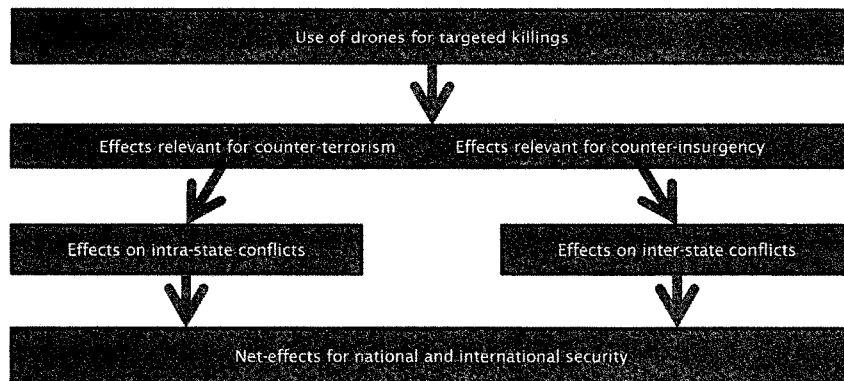
Negative effects for counter-insurgency result primarily from so-called collateral damage, including the loss of civilian lives, as both insurgent (and terrorist) narratives are essentially validated, and we can hypothesize a strengthening of support for the insurgent movements and resulting increased hostilities inflicting higher costs on the US, where it is directly involved in counter-insurgency campaigns, local governments, as well as civilian populations that are not only exposed to greater threats to their physical lives but also overwhelmingly bear the social, economic and political costs of insurgent wars.

That said, it is equally possible to hypothesize positive effects. Drones deployed for ISR for counter-terrorist purposes can assist in increasing the effectiveness of counter-insurgency campaigns, for example, by enabling the disruption of insurgent movements and supply lines. Targeted strikes against terrorist groups can have a deterrent effect, at least in the sense that terrorist-insurgent alliances become less likely. Thus, an effective counter-terrorist campaign can deny insurgents access to resources, safe havens and expertise and thus increase the likelihood of political settlement as it potentially limits their ability to mount a victorious military campaign against the government.

The use of drones thus can affect intra-state conflicts towards escalation or de-escalation (as well as maintain a status quo). However, drone use also has an effect on the relations between states, e.g., between the US and the governments of Afghanistan, Pakistan, or Yemen. As these governments come under increasing pressure domestically because of the impact of drone strikes, they are likely to become more hostile, at least rhetorically, vis-à-vis the US, thus potentially further validating terrorist and insurgent narratives. If hostility extends beyond mere rhetoric, the US may well face losing their cooperation or at least seeing it reduced or suspended. Potentially, similar blow-back could be experienced in countries, and from populations, where the US stations drones. This would reduce the ease with which they can currently be deployed or require sea-based alternatives to current land-based stationing.

In order to assess the broad policy implications of drone strikes, we thus need to consider their combined effects in terms of counter-terrorism and counter-insurgency as it is these combined effects that produce a net-effect (increase, decrease, or status quo) for national and international security through the impact that they have on intra-state and inter-state conflicts (see Figure 1). However, without careful and systematic analysis, of which there is relatively little available to date, partly because of the limited availability of suitable open-source data, we can merely observe a net-impact of a range of factors on national and international security; with drones being one among these factors. In this sense, Figure 1 is a simplification for illustrative purposes, not a statement of a definitive causal chain.

Figure 1: The effect of the use of drones



(2) What evidence do we have to substantiate any of these hypothesized effects?

Drones have arguably been effective in eliminating a number of high-value terrorist operatives (as well as mid-level cadres and foot soldiers) in Afghanistan, Pakistan, and Yemen—that is, they have been instrumental in achieving key objectives in a counter-terrorism strategy. However, this relative success has come at a price. Public opinion surveys and local and international media coverage, as well as academic research and reports by advocacy organizations indicate that blowback has been significant. Anti-Americanism is on the rise, often explicitly linked to the use of drones, insurgent violence continues unabated in Afghanistan (targeting the US and ISAF presence as well as Afghan security forces) and Pakistan (putting increasing pressure on an already weak government), and both the governments of Afghanistan and Pakistan have increased their public stance against the US and especially its drones policy. That said, it has to be borne in mind that US-Pakistani relations had steadily deteriorated prior to the upsurge in drone warfare in Pakistan in 2008; in other words, drone have added to a cumulative series of factors that have contributed to worsening of bilateral relations since the late 1990s.

In other words, the use of drones for targeted killing has eliminated individuals but not destroyed the networks in which they operate. These networks, such as the Haqqani network in Pakistan, have not only survived to date, but have arguably been strengthened with new and more committed recruits. The Haqqani network has also turned more decisively against the government of Pakistan, thus weakening an important US/Western ally in the region, and it continues to undermine counter-terrorist and counter-insurgency efforts in both the Federally Administered Tribal Areas in Pakistan and areas with high Taliban presence in eastern and southern Afghanistan.

The picture is more mixed in Yemen. Here, drone strikes against Ansar al-Shari'a, the military wing of al-Qaeda in the Arabian Peninsula (AQAP) have effectively supported a campaign by Yemeni security forces in coalition with local tribal militias and routed AQAP from significant areas in the south that it had taken over in the course of 2011 and early 2012, forcing the terrorist group to retreat to remaining safe areas in the eastern mountains of Yemen, and denying it control of territory deemed essential for recruitment and as a launch pad for operations in Yemen and overseas. For the time being, this has resulted in the group limiting its external operations (traditionally aimed at aviation targets) and focusing on more traditional guerilla tactics of only local reach. The relative effectiveness

of the counter-terrorist campaign has also, at least temporarily, led to a reduction in the level of collusion between elements in the Yemeni regime and AQAP and tribal acquiescence to its presence and operations. While there can be no question that there has been some blowback in terms of public opinion, there is no clear evidence that the drones campaign in Yemen has either strengthened the southern insurgency (which is motivated by secessionist demands), nor that it has increased the pool of potential recruits for AQAP.

Increased support (limited or otherwise) for al-Qaeda and its affiliates in Afghanistan, Pakistan, and Yemen, however has to be seen within a broader context. Such support is normally due to a whole range of factors, including widespread social, political, economic and other grievances that individuals harbour; and while drone use may be a contributing factor, it is unrealistic to draw direct and singular causal inferences from the correlation of drone use and increased al-Qaeda support. In turn, any successes can equally not solely be attributed to the use of drones.

(3) What can we infer from this for whether drone warfare is an overall effective tool to increase national and international security?

It is difficult to draw clear conclusions, from the limited and anecdotal evidence available in the public domain, about the overall effectiveness of drone warfare for national and international security. This is so for two reasons. On the one hand, the evidence from the three cases—Afghanistan, Pakistan, Yemen—that have seen well over 90% of recorded drone strikes, is decidedly mixed in terms of effects from both a counter-terrorist and counter-insurgency perspective. Terrorist groups in neither country have been able to mount any significant international operations since drones have been deployed there as essential components of US strategy. In this sense, at the very least there has been no short-term net-decrease in US (or other Western) national security as a result of deploying drones. Yet, with the partial exception of Yemen, security within these countries and the wider regions in which they lie, has not improved, and arguably worsened. Insurgent violence continues, government security forces struggle to cope, state institutions remain weak, corruption and transnational organized crime remain rampant posing threats beyond the borders of Afghanistan, Pakistan and Yemen.

On the other hand, and as noted earlier, it is difficult to establish clear causal links between these developments and the use of drones. Drone warfare by the US (and, albeit to a more limited extent and

confined to Afghanistan so far, by the UK) clearly is but one factor in a more complex picture of cause and effect. Drone operations capture international news headlines, but they are far fewer in number than special operations missions. While the latter also result in far fewer civilians being killed, they do have similar effects in terms of popular blowback against the United States, being seen as violations of sovereignty, culturally offensive and creating a feeling of permanent insecurity and uncertainty—much like drones do. At the same time, in their ability to capture, rather than kill, high-value targets, they also play a role in achieving some of the positive effects in counter-terrorist campaigns.

In the context of counter-insurgency campaigns, it is worth remembering that the insurgencies now being countered, and effected by a parallel, but related, counter-terrorist campaign, have much longer and deeper roots and have not been caused by either US counter-terrorism in general or drone warfare in particular. That said, it is also important not to deny that there have been a number of unintended and undesirable consequences of drone warfare from a counter-insurgency perspective, including the strengthening of insurgencies in Pakistan and Afghanistan, the increasingly difficult relations between the US and the governments of both countries, and the rising sense of anti-Americanism among local populations. While the latter is also exploited by political players across the entire spectrum for their own more limited power games, the use of drones for targeted killing (and to a lesser extent ISR), and the loss of civilian life and physical destruction that it brings with it, have strengthened narratives that make desirable domestic political solutions in Afghanistan and Pakistan at least more difficult.

Seen purely from a national security perspective, the available evidence to date, bearing in mind the above caveats, does suggest that drone warfare can be an effective tool in combination with others in the wider arsenal of counter-terrorism if used selectively, judiciously, and as a means of last resort, including in the prevention of acts of terrorism. This is important from a national security perspective, and it is important to realize that, at the same time and in the short term, US (and other allies') national security does not equally depend on successful counter-insurgency. While there is an argument that the failure of counter-insurgency will eventually render current counter-terrorist successes worthless as it will enable a re-grouping and resurgence of terrorist groups and their capabilities to strike at US and Western domestic and overseas interests in the long-term, because it does not destroy their networks, there is at this stage limited evidence to suggest an effective counter-

terrorist campaign, including target hardening at home and abroad, could not continue to contain such resurgent terrorist threats even in the longer term.

In other words, when keeping the objectives of counter-terrorism and counter-insurgency distinct and separate, and prioritizing counter-terrorism over counter-insurgency, drone warfare, as one element of counter-terrorism, can contribute to achieving the desired positive net-effect for national security at considerably lower cost and loss of life among US armed forces personnel than alternative approaches, such as the large-scale use of expeditionary ground forces which, even if deployed for purely counter-terrorist purposes, would be much more likely to be drawn into local insurgencies, to attract foreign terrorist operatives keen to target US assets otherwise beyond their reach, and to suffer significant casualties.

That said, the permanent elimination of terrorist threats, to the extent that this will ever be possible, will depend on sustainable political settlements in countries like Afghanistan, Pakistan, and Yemen, and thus, from today's perspective, at least in part on a successful counter-insurgency campaign. This, however, will be a very costly, long-term effort in which the US and its Western allies can play a supporting role, but in which local governments need to be the key players. Such a strategy would not preclude the continuation of at least selective use of counter-terrorist tools, including the use of lethal force in drone warfare.

(4) What does this mean for the future national and international legal regulation of drone warfare?

Drones have clearly become, and will remain, a fixture in a number of traditional and non-traditional combat theatres. While the present focus is primarily on the use of aerial drones and their deployment by the United States (and to a lesser extent the United Kingdom and Israel) in ISR and strike operations in counter-terrorist campaigns, their potential extends far beyond these current purposes and users. While the US has established a clear quantitative and qualitative advantage, in line with its broader conventional and other military dominance, it is likely that other countries, including potential adversaries, will invest greater resources in developing or otherwise acquiring their own drones capabilities. It may be too early to speak of an impending drones arms race, but proliferation of drones technology and capability is already evident.

This may mean that future diplomatic efforts may be required to negotiate an international regulatory regime for the development, acquisition, and use of drone technology. Until such time that this is deemed feasible and desirable, however, it is important that existing national and international legal frameworks be observed and that their application to the use of drones is transparent. This must include greater public clarity about the distinction between counter-terrorist and counter-insurgency objectives, their relationship to national and international security interests, and the rationale behind prioritizing one over the other (or not).

Sincerely,

A handwritten signature in dark ink, appearing to read 'Stefan Wolff', with a stylized, cursive script.

Stefan Wolff

April 22, 2013

Drone Wars: The Constitutional and Counterterrorism Implications of Targeted Killing

Testimony to the Senate Judiciary Subcommittee on the
Constitution, Civil Rights, and Human Rights

by

The Rt. Rev. James Magness,
Bishop Suffragan for the Armed Services and Federal Ministries
The Episcopal Church¹

I thank Chairman Durbin and Ranking Member Cruz, as well as other members of the Subcommittee, for the opportunity to provide this testimony.

Introduction

The Just War Tradition, an important Christian ethical school-of-thought and one which inspires my ministry as bishop to The Episcopal Church's military chaplains, represents centuries of deliberation between political authorities, moral theologians, military commanders, legal scholars, ethicists, and humanitarians. It lifts up an understanding that war is a necessary evil—or at least an unavoidable reality—and a consensus that war should be executed according to agreed-upon conduct and with as minimal damage to human life and society as possible. As circumstances change and technologies develop, the particular application of the Just War Tradition must be updated.

As the Bishop Suffragan for the Armed Forces for The Episcopal Church, I grieve the loss of every human life taken by war, armed conflict, and violence. I believe that as people of good will we have the responsibility to study and understand the practical, legal, moral, and psychological effects that new technologies introduce to our execution of military engagement. Remotely-Piloted Aircraft (RPAs) represent such new parameters, which must be carefully examined for their ramifications for justice. We are at a nascent stage of engaging RPAs' implications for just and legal war practices, and are far from arriving at an informed consensus on what those practices should be.

¹ On behalf of the Presiding Bishop of The Episcopal Church, Bishop Magness exercises jurisdiction over The Episcopal Church's federal chaplains, who serve those in the military, Veterans Administration hospitals, and federal prisons. Their shared ministry provides spiritual and day-to-day support to service men and women overseas and stateside, veterans requiring medical services, and the incarcerated.

The United States government, along with an estimated 60 other nations, is increasingly employing RPAs for a number of military and civilian functions. The most controversial application of RPA technology is its deployment to target and kill enemy combatants who pose threats to U.S. security and American lives. Both the security threats these non-state combatants present, and the application of RPAs to quell those threats, are products of advances in communication and transportation technologies. Existing international laws of war, which the Just War Tradition upholds, are ill-equipped to regulate emerging threats and tactics such as RPA engagement.

For this reason, the use of RPAs for targeted killings challenges existing international law governing military practices, ushering us into new moral and ethical territory, the ramifications of which are yet unknown. We require far more information, ethical discernment, and international legal negotiation before these controversies are resolved and new legal standards, appropriate to our 21st-century realities, are delineated.

Following the sentiments expressed by The Episcopal Church General Convention,² I offer a testimony today to urge caution, underscore the complexity of these issues, demand rigorous national and international engagement, and dissuade premature definitive decisions made before this long-term engagement has taken place.

RPAs and International Law

Inherently, RPAs are neither good nor bad. They are technological tools deployed and operated by humans for military and civilian use. There is, as yet, limited consensus regarding whether or not RPA-based precision targeting programs violate standards for warfare articulated by the Just War Tradition and codified in the international laws that govern war.

The use of RPAs to target and kill an identified, legitimate military combatant, as defined by Just War Tradition and the Geneva Convention, may well fit within the parameters of international law, provided that mandatory standards of calculated proportionality are met. In these cases, RPAs appear to offer no unique challenges to international law. Therefore they present no new dilemmas that would require moral theological reflection beyond the challenge that any legally-sanctioned war tactic would present.

Our first task must be to challenge the view that all such RPA-based precision targeting programs are morally and legally problematic. Some who deplore all use of RPAs will paint a picture of unbridled machines that lack moral discernment capabilities and are set to kill.

² The General Convention of the Episcopal Church Resolution A017, "Monitor the Use and Ethics of Drone Warfare" (2012).

Undoubtedly, such powerful, autonomous drones that are controlled by on-board virtual intelligence lack those essential and uniquely human characteristics—including a conscience, a desire to avoid personal risk, and an ability to reflect upon and experience death—should never be used to target and kill human beings.

In practice, this image is imprecise. In 2012, I visited a U.S. military base with one of my Episcopal military chaplains to observe the training of RPA operators and RPA operations. During that visit I noted the impressive attention to detail that these operators devoted to the RPA implementation process. RPA missions, constantly flown by live, human operators, are conducted under high-level command and control supervision.

There may, however, be circumstances wherein RPA-based precision targeting practices fall beyond existing international legal standards. As I have stated earlier, this is primarily the result of advances in technology and in the emergence of non-state enemy combatants who are well-equipped to pose viable threats to American security. These new opponents present threats against which RPA practices offer the most viable potential safeguard. At least three modern technologies—RPAs; cyber warfare; and human performance enhancement by biological, medical, and cybernetic means—necessitate serious conversation and re-configuration of international law.

There are other RPA-based precision targeting practices that may fall beyond the current moral and practical standards for war that even new, reconfigured standards would prohibit. Under any existing or new Just War standard, the use of RPA-based precision targeting practices that compromise a state's sovereignty or could result in any civilian casualties should raise serious concerns and receive the highest levels of scrutiny.

The usage of RPAs poses many challenges to international law and the Just War Tradition, including violations of state sovereignty; lack of shared risk and liability between combatants; and questions of proportionality, transparency, accountability, reciprocity, designations of enemy combatants, and discrimination and targeting.

An even thornier issue is the unclear delineation between combat operations prosecuted by the U.S. military, and political or intelligence operations conducted by non-military government agencies. Evidence suggests that distinctions between these two have become blurred, thus raising serious ethical concerns and legal problems.

I contend that Americans need more accurate information about how existing protocols were established and are currently employed for RPA precision targeting programs. Due to high levels of security classification, there is a lack of transparency regarding how RPAs are being employed. This lack of clarity leaves unknown far too many tactical details that must be

examined by international lawyers, military ethicists, and moral theologians. President Obama and the U.S. Congress must explain the moral and legal grounds which guide their current practices. Specific unanswered questions include:

- Who has the discretion to authorize a RPA-based precision targeting program? Under whose legitimate political authority are these decisions being implemented?
- What are the morally significant distinctions between precision targeting and assassination?
- How should moral principles and international law govern the selection of precision targets?

Until policy makers, military personnel, ethicists, and moral theologians have achieved much more clarity about the requirements for justice within the context of these changing realities, we must exercise restraint in making definitive conclusions or policy proposals.

Unknown Moral and Psychological Consequences of RPAs

Most importantly, as The Episcopal Church bishop serving U.S. military chaplains, I am most concerned about the possible moral and psychological ramifications that our government's use of RPAs for precision targeting has on U.S. military RPA operators, those whom we have targeted for assassination, and the communities of non-combatant civilians who encounter and experience the ramifications of these new technologies.

Emerging evidence suggests that prolonged operational exposure to RPAs may cause disproportionate, long-term moral and psychological damage both to U.S. military RPA operators and to peaceful citizens around the world. We must give much more in-depth, careful attention to these consequences. More research is required in the following areas to answer questions, including:

- What moral and psychological damage does the execution of RPA-based targeted killings cause to those who are commanding and piloting these aircraft? Evidence suggests that these operators experience levels of Post Traumatic Stress that are as high as or higher than those experienced by conventional combat aircraft pilots, especially those who have tracked targeted individuals for hours or days before their attack and are forced to assess, often with excruciating detail, the damage an attack has caused to the body of the target and the experiences of loss felt by their families and communities.
- What are the long-term damages caused by the psychological stresses a civilian community experiences when they are knowingly under constant surveillance by weaponized tracking aircraft?

Conclusion

The gravity of these and other unanswered moral and ethical questions raised by the employment of RPAs in military operations requires much more reflective, thoughtful critique than has been exercised to date.

In the case of non-conventional enemy combatants and Remotely Piloted Aircraft deployed to target those combatants, technology has far exceeded the pace of moral and ethical reflection. I applaud the Senate Judiciary Committee for beginning to engage this challenging, complex issue. And I urge extreme caution at the start of this long-term debate. I urge you to avoid grandiose decisions that would endorse or ban these warfare tactics before such inquiry and rigorous discernment has taken place.



STATEMENT OF
MARGARET HUANG, EXECUTIVE DIRECTOR
RIGHTS WORKING GROUP

FOR THE HEARING ON
DRONE WARS: THE CONSTITUTIONAL AND COUNTERTERRORISM IMPLICATIONS OF
TARGETED KILLING

SENATE JUDICIARY COMMITTEE
SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS AND HUMAN RIGHTS

APRIL 23, 2013

Chairman Durbin, Ranking Member Cruz and members of the Subcommittee: I am Margaret Huang, Executive Director of Rights Working Group. Thank you for the opportunity to submit testimony for inclusion in the record of today's hearing.

Rights Working Group (RWG) was formed in the aftermath of September 11th to promote and protect the human rights of all people in the United States. A coalition of more than 350 local, state and national organizations, RWG works collaboratively to advocate for the civil liberties and human rights of everyone regardless of race, ethnicity, religion, national origin, citizenship or immigration status. Currently, RWG leads the *Racial Profiling: Face the Truth* campaign, which seeks to end racial and religious profiling.

RWG applauds the Subcommittee for opening a crucial discussion regarding the legal, ethical, and strategic implications of drone use by the U.S. federal government. The use of drones by the military and Central Intelligence Agency (CIA) under the Bush and Obama administrations has been troublingly opaque and exempt from democratic checks and balances. President Obama himself stated last year that, with regard to drones, "one of the things that we've got to do is put a legal architecture in place, and we need Congressional help to do that to make sure that not only I am reined in, but any president is reined in."¹ RWG supports the creation of such legal architecture, and of mechanisms to ensure the transparency and accountability of drone use. Without this needed oversight, serious violations of international human rights law and of due process and privacy rights, already a concern in U.S. drone policy, are likely to persist. Current practices are unacceptable for a nation founded upon democratic values and set a dangerous precedent as drone technology becomes more widely used and available.

¹ Maureen Dowd, *The C.I.A.'s Angry Birds*, N.Y. Times (April 16, 2013), http://www.nytimes.com/2013/04/17/opinion/the-cias-angry-birds.html?_r=0



Background

Unmanned aircraft, commonly known as drones, have existed for much of the twentieth century. Throughout that time, and increasingly today, they have been used primarily for surveillance.² The first lethal drone, the MQ-1B Predator, was launched in 1994, and combined drones' traditional surveillance and intelligence capacity with the ability to carry AGM-114 Hellfire missiles. Since 2002, the CIA has used Predator and the larger Reaper drones to carry out targeted killings of suspected members of Al Qaeda and other armed terrorist groups in Afghanistan, Yemen, Somalia, Pakistan, and possibly other states. According to the Bureau of Investigative Journalism (BIJ), the strike data aggregator considered to be most accurate by leading human rights lawyers,³ Pakistan, the country most heavily targeted by U.S. drones, was struck 52 times under the Bush administration and 316 times under the Obama administration.⁴ In Pakistan alone, drones have killed an estimated 2,541 to 3,533 people, including at least 411 to 844 civilians and 168 to 197 children. Meanwhile, unarmed drones are increasingly common surveillance tools used by government and private consumers both domestically and abroad.⁵

Targeted Killings, Human Rights and Due Process

Serious human rights and due process concerns arise when examining the U.S. government's history of determining appropriate targets for drone killings. According to reports, both the Bush and Obama administrations have engaged in so-called "personality" strikes, which aim to kill specific, named leaders of armed militant organizations such as Al Qaeda. Under Obama, however, the use of so-called "signature" strikes has also expanded drastically, targeting groups of unidentified men whose behaviors appear—according to intelligence gathered through drone surveillance—to suggest terrorist activity.⁶

While both administrations have publicly described drone strikes as "surgical," meaning a method to kill terrorists precisely with no collateral damage, independent investigations have found this claim to be false. Indeed, while the Obama administration has claimed low civilian casualty numbers, it is largely due to a system, as detailed by the New York Times, that counts

² International Human Rights and Conflict Resolution Clinic at Stanford Law School and Global Justice Clinic at NYU School of Law, *Living Under Drones: Death, Injury, and Trauma to Civilians from U.S. Drone Practices in Pakistan* (2012), p. 8; Jennifer Lynch, *Are Drones Watching You?*, Electronic Frontier Foundation (January 10, 2012) <https://www.eff.org/deeplinks/2012/01/drones-are-watching-you>

³ Human Rights Clinic at Columbia Law School, *Counting Drone Strike Deaths* (October 2012), Summary and Recommendations, <http://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/COLUMBIACountingDronesFinal.pdf>.

⁴ Bureau for Investigative Journalism, *Casualty Estimates: CIA Drone Strikes in Pakistan 2004-2013*, <http://www.thebureauinvestigates.com/category/projects/drone-data/>

⁵ For information on domestic drone use, see this *Map of Domestic Drone Authorizations*, <https://www.google.com/fusiontables/embedviz?viz=MAP&q=select+col2+from+1WuTyH62PmUF97oxo6ireT1BLaw9HJN5pocwmwg&h=false&lat=44.08758502824518&lng=-85.5615234375&z=4&t=1&l=col2&v=1&tplt=2>

⁶ Stanford and NYU, p. 12.



all military-age males killed following a strike as “militants” or “combatants” unless there is posthumous evidence of their innocence. Such evidence is almost impossible to gather or publicize, given the remoteness of the regions where most strikes occur and the brutality of the attacks.⁷ Dubious claims of precision have characterized drone use from first strike in 2002, when three men were killed in a failed attempt to target Osama bin Laden. At that time, a Pentagon spokeswoman stated “[w]e’re convinced that it was an appropriate target... [though w]e do not know yet exactly who it was.”⁸

In 2011, a public debate regarding the legal and ethical aspects of U.S. drone use was spurred when three U.S. citizens, including the cleric Anwar al-Aulaqi, his 16-year-old son Abdulrahman al-Aulaqi, and Samir Khan were killed without due process by targeted drone strikes in Yemen. According to a recent report by the New York Times, neither the younger al-Aulaqi nor Khan was considered “a significant enough threat to warrant being specifically targeted.” Significant evidence that Anwar al-Aulaqi posed a specific threat to U.S. security has been made public. However, we find it equally disturbing that the process by which the Anwar al-Aulaqi was deemed a legitimate target was secretive and based upon unknown criteria.⁹ RWG believes that all U.S. citizens, including those accused of serious crimes, must be afforded due process and a fair day in court before facing penalties, particularly a death sentence.

It is highly unlikely that the U.S. government’s drone strikes comply fully with international humanitarian law, in the case of armed conflict; with international human rights law, in the absence of armed conflict; or with U.S. laws regarding due process rights, in the case of targeted U.S. citizens¹⁰. Signature strikes in particular, along with the apparent definition of “militant” or “combatant,” most likely violate international laws which demand distinction, proportionality, humanity, and strict necessity in any killing.¹¹ Additionally, all U.S. citizens (especially those who pose no specific threat to the country) must be charged with a crime and put to a fair trial before receiving a death sentence, a fundamental due process right that has been denied several U.S. citizens targeted directly or indirectly by drones. Perhaps most troublingly, Congress and the U.S. public have had few resources to evaluate the legal and ethical bounds of the government’s drone use, due to an utter lack of transparency surrounding the drone program. A Freedom of Information Act (FOIA) lawsuit filed in 2012 by the American Civil Liberties Union (ACLU), seeking information about the targeted killings of the three U.S.

⁷ Jo Becker and Scott Shane, *Secret ‘Kill List’ Proves a Test of Obama’s Principles and Will*, New York Times (May 29, 2012), http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?pagewanted=all&_r=0

⁸ Stanford and NYU, p. 10

⁹ Mark Mazzetti, Charlie Savage and Scott Shane, *How a U.S. Citizen Came to Be in America’s Cross Hairs*, New York Times (March 9, 2013), http://www.nytimes.com/2013/03/10/world/middleeast/anwar-al-awlaki-a-us-citizen-in-america-cross-hairs.html?pagewanted=all&_r=0&adxnlp=1366343083-rG014FFSNJZFV5XNGiEocg

¹⁰ Stanford and NYU, *Chapter 4: Legal Analysis*, p. 103-124

¹¹ Stanford and NYU, p. 112, p. 117



citizens described above, has garnered no information. Indeed, according to the ACLU website, “the government has refused to confirm or deny whether it killed these three citizens or even whether the CIA has a targeted killing program, despite numerous statements by U.S. officials to the media about the program.”¹²

RWG’s Face the Truth campaign seeks to combat racial profiling, and the coalition opposes the targeting of any individual or group by law enforcement because of race, ethnicity, religion or national origin and in the absence of a specific crime investigation or suspect description. We urge the Senate to compel the Obama administration and particularly the CIA to release information about the targeted killing program. Additionally, we urge Congress to establish a strong legal framework around the use of drones, one that upholds international humanitarian and human rights law, that prioritizes due process rights for all U.S. citizens, and that prohibits the targeted killing of any individual or group about whom little is known and to whom no specific crime can be traced. In addition to violating fundamental Constitutional principles and setting a dangerous precedent for the international use of armed drones, targeted killing is a counterproductive counterterrorism measure, one that turns people around the globe against the United States and may inspire more potential anti-U.S. militants than it kills.

Domestic Surveillance and Privacy Rights

While the topic of this hearing is drone use for targeted killing, RWG would like to take this opportunity to raise concerns over the use of drone technology for surveillance within the United States. A 2012 FOIA lawsuit filed by the Electronic Frontier Foundation (EFF) against the Federal Aviation Administration, the federal government entity charged with authorizing domestic drone use, has revealed widespread and growing use throughout the country.¹³ Local and state police are beginning to use drones for (often warrantless) surveillance and common law enforcement activities. Drone manufacturers have obtained permits to show off their products’ capabilities to consumers, and numerous private companies and universities have purchased them. The U.S. Air Force and Marine Corps fly drones all over the country, and the New York Times reported last year that these are frequently used for warrantless surveillance such as tracking cars.¹⁴ Customs and Border Protection (CBP) flies unarmed Predator drones, equipped with powerful cameras and cell phone interception technology, along the Mexican and Canadian borders. These machines, in addition to monitoring the border, have been loaned to nearby federal, state and local law enforcement agencies with little oversight. EFF has filed a FOIA lawsuit against CBP to learn more about these uses.

¹² American Civil Liberties Union, *Targeted Killings*, <http://www.aclu.org/national-security/targeted-killings>

¹³ Lynch, *Are Drones Watching You?*

¹⁴ Mark Mazzetti, *The Drone Zone*, New York Times (July 6, 2012), <https://www.nytimes.com/2012/07/08/magazine/the-drone-zone.html?pagewanted=all&r=0>



Unarmed Predator drones are capable of eavesdropping on electronic transmissions, intercepting text messages and cell phone conversations, and cracking Wi-Fi networks, without the knowledge of the communications provider or consumer. All types of drones can carry powerful imaging technology, including day and nighttime video cameras, zoom cameras, heat sensors, infrared cameras, and even a technology called "Gorgon Stare," which can capture motion imagery of an entire city.¹⁵ At this point, the use of these powerful technologies is subject to few regulations, and it is unclear whether the current federal legal frameworks protect residents from warrantless aerial surveillance, which RWG considers a fundamental Constitutional right.¹⁶ At least 30 state legislatures have proposed laws to protect citizens from drones, by requiring a probable cause warrant for drone surveillance by police, for example, or banning weaponized drones entirely.¹⁷ Virginia became the first state to sign such a bill into law in February, 2013.¹⁸

The Need for Federal Legislation

Drone use is becoming widespread and commonplace with breakneck speed. Between 2005 and 2012, drones grew from 5% of all U.S. war planes to nearly 33%.¹⁹ Increasing numbers of local and state police are gaining drone permits, and the recently introduced immigration reform bill titled the *Border Security, Economic Opportunity, and Immigration Modernization Act of 2013* would mandate persistent 100% surveillance of the border by CBP drones if passed. In light of these developments, Congress ought to follow many state legislatures' lead and develop a legal framework to regulate the use, internationally and domestically, of armed and unarmed drones. This framework must prioritize the human rights of all people and protect the due process and privacy rights of all U.S. citizens and people in the United States. We hope that the Senate Judiciary Subcommittee on the Constitution, Civil Rights and Human Rights will hold another hearing to examine these critically important concerns.

¹⁵ Jennifer Lynch, *Newly Released Drone Records Reveal Extensive Military Flights in the U.S.*, Electronic Frontier Foundation (December 5, 2012), <https://www.eff.org/deeplinks/2012/12/newly-released-drone-records-reveal-extensive-military-flights-us>

¹⁶ American Civil Liberties Union, *Protecting Privacy from Aerial Surveillance: Recommendations for Government Use of Drone Aircraft* (December 2011), p. 7

<https://www.aclu.org/files/assets/protectingprivacyfromaerialsurveillance.pdf>. "In the 1980s the Supreme Court ruled that the Fourth Amendment does not categorically prohibit the government from carrying out warrantless aerial surveillance of private property."

¹⁷ Allie Bohm, *Drone Legislation: What's Being Proposed in the States?*, Free Future: Protecting Civil Liberties in the Digital Age, American Civil Liberties Union (March 6, 2013), <http://www.aclu.org/blog/technology-and-liberty-national-security/drone-legislation-whats-being-proposed-states>.

¹⁸ Jason Koebler, *Virginia Becomes First State to Pass Drone Regulations*, U.S. News & World Report (February 5, 2013), <http://www.usnews.com/news/articles/2013/02/05/virginia-becomes-first-state-to-pass-drone-regulations->

¹⁹ Lynch, *Are Drones Watching You?*



**STATEMENT OF
Maya Berry, Executive Director
ARAB AMERICAN INSTITUTE
HEARING ON: DRONE WARS: THE CONSTITUTIONAL AND COUNTERTERRORISM
IMPLICATIONS OF TARGETED KILLING
SENATE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND HUMAN RIGHTS
UNITED STATES SENATE**

April 30, 2013

Chairman Durbin, Ranking Member Cruz and members of the Subcommittee: I am honored to submit this testimony for the record on behalf of the Arab American Institute for the hearing on "Drone Wars: The Constitutional and Counterterrorism Implications of Targeted Killing."

The Arab American Institute applauds the Subcommittee for holding this timely hearing. As you are aware, civilian casualties caused by drones have been a matter of intense debate. Most recently, several members of Congress have requested that there be greater transparency about the Administration's targeted strikes.

In the last decade alone, drone strikes have killed an estimated total of 2,600 to 4,700 people. Proponents of the use of drones assert that drone strikes are precise, but a study from Columbia Law School's Human Rights Institute found that the number of Pakistani civilians killed in drone strikes is "significantly and consistently underestimated."¹ "Between 2004 and

¹ "Counting Deaths from Drone Strikes," Columbia Law School Human Rights Institute, <http://web.law.columbia.edu/human-rights-institute/counterterrorism/drone-strikes/counting-drone-strike-deaths>.

mid-April 2013, the drone campaign in Pakistan has killed 55 militant leaders...while this represents a significant blow to the militant chain of command, these 55 deaths account for only two percent of all drone-related fatalities in Pakistan,” said Peter Bergen during his prepared testimony. Similarly, in Yemen, the thirty-four leaders who have been killed there due to drone strikes, only account for six percent of the total casualties of strikes.²

Upon taking office in 2009, President Obama has used drones as a major national security tool. This Administration has drastically expanded the drones program, specifically authorizing 307 strikes in Pakistan alone, which was six times more than the number of strikes administered during both terms of President Bush. Additionally, under this Administration, the program accelerated from an average of one strike every 40 days to one every 4 days by mid-2011.

The testimony offered by Yemeni youth activist Farea Al-Muslimi on the impact of drone strikes on his home village in Wessab, Yemen was particularly eye opening: “Just six days ago, my village was struck by a drone, in an attack that terrified thousands of simple, poor farmers. The drone strike and its impact tore my heart, much as the tragic bombings in Boston last week tore your hearts and also mine,” said Farea.

What Farea poignantly spoke of in his testimony is the stain the Administration’s drone policy will leave on our standing in the international community and the unintended consequences of attacks that may serve as a recruitment tool for extremists. “What the violent militants had previously failed to achieve, one drone strike accomplished in an instant,” said Farea.

“For me personally, it is deeply troubling, astonishing, and challenging to reconcile that the very same hand that taught me English, awarded me scholarships, and dramatically improved my life is the hand that droned my village, terrified my people, and now makes it harder for them to believe the good things that I tell them about America and my American friends,” said Farea.

There needs to not only be greater transparency about the Administration’s drone policy, but better clarity on the legal justification and basis for the targeted strike. Further, the Administration needs to take additional steps to ensure that civilian populations do not continue to comprise the overwhelming majority of casualties.

² April 23, 2013 prepared testimony by witness Peter Bergen

STATEMENT ON BEHALF OF AMNESTY INTERNATIONAL USA

*SUBMITTED BY ZEKE JOHNSON, DIRECTOR,
SECURITY & HUMAN RIGHTS CAMPAIGN*

**“DRONE WARS: THE CONSTITUTIONAL AND COUNTERTERRORISM IMPLICATIONS
OF TARGETED KILLING”**

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

APRIL 16, 2013

1. Introduction

Mr. Chairman and members of the Committee, I am honored to submit this testimony for the record on behalf of Amnesty International USA. I will focus my remarks on the human rights concerns and recommendations made in Amnesty International reports *"USA: 'Targeted Killing' Policy Violates the Right to Life"* (Index AMR 51/047/2012) and *"The Devil in the (Still Undisclosed) Detail: Department of Justice 'White Paper' on the Use of Lethal Force Against U.S. Citizen's Made Public"* (Index AMR 51/006/20123).

Amnesty International is a worldwide human rights movement with more than 3 million members and supporters in more than 150 countries and territories. Amnesty International's vision is for every person to enjoy all of the human rights enshrined in the Universal Declaration of Human Rights and other international human rights standards. Amnesty International's mission is to conduct research and take action to prevent and end grave abuses of all human rights. Amnesty International is independent of any government, political ideology, economic interest or religion. The organization is funded by individual members; no funds are sought or accepted from governments for investigating and campaigning against human rights abuses.

Amnesty International fully recognizes the US government's duty to take robust action to protect the life and physical integrity of people within its jurisdiction, and to bring to justice perpetrators of crimes under international law. But in doing so, the US government must respect its obligations under international human rights law, which applies in peacetime and in armed conflict, and under international humanitarian law (the law of armed conflict) which applies only in situations of armed conflict.

Those responsible for the attacks in the USA on September 11th, 2001, attacks that deliberately targeted civilians and which Amnesty International has repeatedly condemned as a crime against humanity, should be brought to justice through fair criminal trials without recourse to the death penalty, as should anyone responsible for carrying out or planning further such attacks. This is a realistic aim that can and should be achieved through cooperation between states in accordance with their international obligations.

Under the law enforcement standards applicable in such circumstances, situations can arise where the intentional use of lethal force might be justified in the course of attempts to arrest such persons, i.e. where strictly unavoidable to protect against immediate threats to the life of the persons carrying out the arrests, or to the lives of others, posed by individuals who resist arrest.

Amnesty International also recognizes that where the US government is a party to a specific armed conflict, lethal attacks conducted within the zone of the conflict that comply with the laws of armed conflict generally will not violate the right to life as protected under international human rights law.

However, current US administration policies and practices on intentional use of lethal force, including against individual suspected of involvement in terrorism, appear to go substantially beyond what is permitted under the rules of international law.

2. International Law & Lethal Force

International human rights law and, in the exceptional circumstances where it applies, international humanitarian law (the law of armed conflict) as well, address the use of lethal force by states.

Deliberate killings that do not comply with the relevant rules of international law are often referred to as “extra-legal, arbitrary or summary executions” or “extra-judicial executions.” Principle 1 of the UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions provides:

“Governments shall prohibit by law all extra-legal, arbitrary and summary executions and shall ensure that any such executions are recognized as offences under their criminal laws, and are punishable by appropriate penalties which take into account the seriousness of such offences. Exceptional circumstances including a state of war or threat of war, internal political instability or any other public emergency may not be invoked as a justification of such executions. Such executions shall not be carried out under any circumstances including, but not limited to, situations of internal armed conflict, excessive or illegal use of force by a public official or other person acting in an official capacity or by a person acting at the instigation, or with the consent or acquiescence of such person, and situations in which deaths occur in custody. This prohibition shall prevail over decrees issued by governmental authority.”

Where the state deliberately kills someone, the onus is on the state to demonstrate that the killing is lawful. Family members of a person who is killed have the right to receive the results of an independent and impartial investigation, including a judicial process.

2.1 International Human Rights Law

It is a fundamental rule of international human rights law that no-one may be arbitrarily deprived of his or her life. Article 6(1) of the International Covenant on Civil and Political Rights (ICCPR), for instance, provides as follows:

“Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”

This is a provision of international human rights law that can never be suspended or otherwise derogated from even “in time of public emergency which threatens the life of the nation.” Indeed even in situations of full-blown armed conflict, the right not to be arbitrarily deprived of one’s life continues to apply, including in respect of acts outside a state’s ordinary territory, though in zones of armed conflict what is “arbitrary” generally is to be determined by international humanitarian law.

The fact a person may have been responsible for murder, even mass murder, or may be planning such crimes, does not in itself legally justify his or her killing at the hands of state authorities without a criminal trial. The circumstances in which international human rights law allows an individual to be lawfully deprived of his or her life are very restricted.

In general, the intentional use of lethal force is lawful only if, at the time of its use, it is "strictly unavoidable" in order to meet an "imminent threat of death" in self-defense or defense of others. Principle 9 of the 1990 UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials states as follows:

"Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life."

Even where such circumstances exist, there are additional requirements for the use of force to be lawful. Principle 10 of the Basic Principles provides that:

"In the circumstances provided for under principle 9, law enforcement officials shall identify themselves as such and give a clear warning of their intent to use firearms, with sufficient time for the warning to be observed, unless to do so would unduly place the law enforcement officials at risk or would create a risk of death or serious harm to other persons, or would be clearly inappropriate or pointless in the circumstances of the incident."

The UN Basic Principles reflect the legal obligations of states under, for instance, article 6 of the ICCPR. As such, while framed in terms of "law enforcement officials," they apply equally to "military authorities, whether uniformed or not" and "State security forces" when those authorities are exercising "police powers" (including any use of force outside of a situation of armed conflict).

2.2 International Humanitarian Law (the Law of Armed Conflict)

The only exception to the ordinary "law enforcement" rules in relation to the use of lethal force and the right to life, as set out above, is in the exceptional situation of zones of armed conflict. In the context of an international armed conflict, a person who is a member of the armed forces of a state, or a civilian who is at the relevant time directly participating in hostilities, may be lawfully targeted for attack (and killed), if the attack complies with the rules of international humanitarian law. Applying this rule to non-international armed conflict may, at least in some circumstances, require attempting to capture, rather than kill, members of armed groups wherever practically possible.

Among the fundamental rules of international humanitarian law, binding on all parties to an armed conflict—whether international or non-international, are the prohibition of indiscriminate attacks (i.e. those that are of a nature to strike military objectives and civilians or civilian property without distinction) and the prohibition of attacks that are disproportionate (i.e. those that may be expected to cause incidental loss of civilian life, injury to civilians or damage to civilian property, that would be excessive in relation to the concrete and direct military advantage anticipated).

Under international humanitarian law, if there is doubt as to whether a person is a civilian, the person is to

be considered a civilian. In the conduct of military operations, states must take “constant care” to “spare the civilian population, civilians and civilian objects”; specifically, “all feasible precautions must be taken to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects.”

3. Current US Policy and Practice Violate the Right to Life

While some of the administration’s killings in question, if conducted in the context of specific armed conflicts, for instance in Afghanistan or at some times in some parts of Pakistan, Yemen or Somalia, may not violate international human rights or international humanitarian law, the administration’s policy appears also to permit extrajudicial executions in violation of international human rights law, virtually anywhere in the world.

Among the particular concerns of Amnesty International are:

- The administration’s continued reliance on a “global war” legal theory that treats the entire world as a battlefield between the USA and certain armed groups, on which lethal force may apparently be used without regard to human rights standards;
- The administration’s invocation of the right to use force in self-defense to justify the deliberate killing of virtually anyone suspected of involvement of any kind in relation to a range of armed groups and/or terrorism against the USA, particularly through the adoption of a radical re-interpretation of the concept of “imminence”;
- The reported practice of “signature strikes” which appears to allow targeting of individuals on the basis of patterns of behavior and requires no specific knowledge about an individual’s direct participation in hostilities or an imminent threat;
- The fact that key factual and legal details of the killing program remain shrouded in secrecy.

These aspects of US policy and practice are not only contrary to international law and result in deaths and injuries to an unknown number of civilians. They also weaken the credibility of the US government as an advocate for respect for human rights by other states; they set dangerous precedents that other states may exploit to avoid responsibility for their own unlawful killings; and if unchecked there is a real risk that the US “global war” doctrine will further corrode the foundations of the international framework for protection of human rights. There has also been widespread speculation that current US policies and practices with respect to such killings may inadvertently be building support for the very armed groups and terror attacks that US officials say provide its justification.

4. The “White Paper”

The US Department of Justice “white paper,” which “sets forth a legal framework for considering the circumstances in which the US government could use lethal force in a foreign country outside the area of active hostilities against a US citizen who is a senior operational leader of al-Qa’ida or an associated force of al-Qa’ida,” was first made public by NBC News. The document added little new substance to what various administration officials had already said publicly on this issue. It ignores the US government’s international human rights obligations, and expands the notion of “imminent attack” to which the USA might respond with lethal force. It provides no case detail, and considers the lethal force question mainly under US constitutional and statutory law. The fact that the document makes no express reference to international human rights law is unsurprising – this has become the norm for officials outlining policy

and practice under the US government's notion of a global armed conflict with al-Qa'ida and associated forces.

4.1 Non-Discrimination

The Justice Department paper, "an unclassified document prepared for some members of Congress," which apparently summarizes a longer legal memorandum that remains classified and undisclosed, addresses specifically the legality of the "targeted" killing in a "foreign country" of US citizens by the US government. It should not be forgotten that the vast majority of those killed by US forces in such operations in recent years, principally in drone attacks, have been foreign nationals. While the white paper concludes that "the US citizenship of a leader of al-Qa'ida or its associated forces...does not give that person constitutional immunity from attack," it is not clear whether the case of a US citizen assessed as the possible target for lethal force would receive a greater degree of scrutiny and caution from decision-makers than an identically placed foreign national. There is certainly greater domestic political pressure on the administration to make clear its full legal opinions on the "targeted killing" of US nationals.

Amnesty International reminds the US government not to allow the domestic focus on US nationals to distract from a fundamental concept of universal human rights, namely that the right to life, to liberty, and to fair trial of every human being is to be respected without discrimination on the basis of their nationality.

4.2 'Global War' with Al-Qa'ida et al

The white paper restates an overarching concept employed by the USA in the counter-terrorism context. That is, that "the United States is in an armed conflict with al-Qa'ida and its associated forces," and that the US Congress, by passing the Authorization for Use of Military Force (AUMF) in the immediate aftermath of the attacks of 11 September 2001, had authorized the President to use "all necessary and appropriate force" in response. The armed conflict has no geographical or temporal limits under the AUMF. The Justice Department paper asserts that "none of the three branches of the US Government has identified a strict geographical limit on the permissible scope of the AUMF's authorization."

This is not to say that no official has expressed concern about the AUMF's broad scope. According to a US federal judge in 2008, the AUMF is "the most far-reaching bestowal of power upon the Executive since the Civil War... The broad language of the AUMF, literally construed, gives the President *carte blanche* to take any action necessary to protect America against any nation, organization, or person associated with the attacks on 9/11 who intends to do future harm to America.... I am cognizant that the Commander-in-Chief must be able to conduct a war without undue interference from a co-equal branch of government... However, an independent judiciary is obliged to preserve the fundamental building blocks of our free society." The Justice Department paper asserts that there can be no judicial oversight of this lethal force policy.

The fact that the US government's global war paradigm has gained acceptance across the three branches of its government renders it no less an unacceptably unilateral departure from the very concept of the international rule of law in general, and the limited scope of application of international humanitarian law in particular. The message sent is that a government can ignore or jettison its human rights obligations and replace them with rules of its own whenever it decides that the circumstances warrant it. Under its global war framework, the US government has at times resorted, among other things, to enforced disappearance, torture, secret detainee transfers, indefinite detention, and unfair trials, as well as this policy that plays fast and loose with the concept of "imminence" and appears to permit extrajudicial

executions. As the global war theory has gained acceptance across the three branches of government, truth, accountability and remedy have been sacrificed. As Amnesty International has previously pointed out, the AUMF was passed with little substantive debate and considerable apparent confusion among legislators about what they were voting for. The organization has since 2006 called for the AUMF to be withdrawn and for the USA to abandon its global war framework.

The white paper goes into some detail on the USA's theory of the armed conflict with al-Qa'ida. Pointing to the 2006 *Hamdan v. Rumsfeld* ruling of the US Supreme Court which reversed President George W. Bush's 2002 decision that Article 3 Common to the four Geneva Conventions was not applicable to Taliban or al-Qa'ida detainees, the paper asserts that "the United States is currently in a non-international armed conflict with al-Qa'ida and associated forces" and that "any US operation would be part of this noninternational armed conflict, even if it were to take place away from the zone of active hostilities." It continues:

"Particularly in a noninternational armed conflict, where terrorist organizations may move their base of operations from one country to another, the determination of whether a particular operation would be part of an ongoing armed conflict would require consideration of the particular facts and circumstances in each case, including the fact that transnational non-state organizations such as al-Qa'ida may have no single site serving as their base of operations.

If an operation of the kind discussed in this paper were to occur in a location where al-Qa'ida or an associated force has a significant and organized presence and from which al-Qa'ida or an associated force, including its senior operational leaders, plan attacks against US persons and interests, the operation would be part of the non-international armed conflict between the United States and al-Qa'ida that the Supreme Court recognized in Hamdan. Moreover, such an operation would be consistent with international legal principles of sovereignty and neutrality if it were conducted, for example, with the consent of the host nation's government or after a determination that the host nation is unable or unwilling to suppress the threat posed by the individual targeted. In such circumstances, targeting a US citizen of the kind described in this paper would be authorized under the AUMF and the inherent right to self-defense."

The white paper does not satisfactorily address the fundamental question of how the administration's global armed conflict paradigm complies with the international legal definition of armed conflict. Amnesty International recognizes that the US government has, over the past decade, participated in a number of actual armed conflicts, both of an international and non-international character, on the territory of several states, some of which continue today. Where it is a party to such an armed conflict, the USA's use of intentional lethal force against individuals who are directly participating in hostilities would not necessarily violate international law, if it acted in conformity with the rules of international humanitarian law. However, Amnesty International remains unpersuaded and deeply troubled by the white paper's assertion that the USA is engaged in a global and pervasive armed conflict against a diffuse network of non-state actors which provides its forces, under international law, with license to kill individuals anywhere in the world at any time, whenever it deems, based on secret information, such actions to be appropriate. To accept such a theory would obviously be to twist international human rights and humanitarian law and other basic rules of public international law to their breaking points. It would also fundamentally undermine crucial protections for human rights of civilians that have been painstakingly developed over more than a century of international law-making.

4.3 A broader concept of imminence

Amnesty International pointed out in its June 2012 report on the USA's "targeted killing" policy that the administration's self-defense justification appears to be just another variant of the "global war" theory. The organization was particularly concerned by the USA's radical reinterpretation of the concept of "imminence" when invoking the right to use lethal force in self-defense. If anything, the white paper's treatment of the imminence question has only heightened concern about the administration's distortion of this concept.

Adopting a much looser notion of imminence than human rights law, and international law more generally requires, the white paper asserts that, given the nature of international terrorism:

"the condition that an operational leader present an 'imminent' threat of violent attack against the United States does not require the United States to have clear evidence that a specific attack on US persons and interests will take place in the immediate future... By its nature...the threat posed by al-Qa'ida and its associated forces demands a broader concept of imminence in judging whether a person continually planning terror attacks presents an imminent threat, making the use of force appropriate. In this context, imminence must incorporate considerations of the relevant window of opportunity, the possibility of reducing collateral damage to civilians, and the likelihood of heading off future disastrous attacks on Americans."

With this in mind, the Justice Department asserts that for a US official to make an assessment of whether a specific al-Qa'ida leader presents an imminent threat, he or she must take into account certain generalities, namely that "certain members of al-Qa'ida" are "continually plotting attacks against the United States"; that "al-Qa'ida would engage in such attacks regularly to the extent it were able to do so"; that the US authorities "may not be aware of all al-Qa'ida plots"; and that, in view of the above, "the nation may have a limited window of opportunity within which to strike."

The paper provides an example. An operational leader of al-Qa'ida or an associated force would constitute an "imminent threat" if:

- he or she has been "personally and continually involved in planning terrorist attacks against the United States";
- he or she has "recently been involved in activities posing an imminent threat of violent attack against the United States"; and
- there is "no evidence suggesting that he has renounced or abandoned such activities."

In other words, an individual could be designated as posing an "imminent threat" (and therefore subject to "targeted" killing) in the absence of intelligence about a specific planned attack or the individual's personal involvement in planning or carrying out a specific attack. This notion stretches the concept of imminence in a manner that is potentially disastrous for the protection of human rights and the international rule of law.

The quality of intelligence needed to make such determinations is not the subject of the white paper – needless to say, intelligence is not a precise science. Just how accurate it may or may not be in any particular situation is made even more difficult to independently assess by the secrecy surrounding executive decision-making on this issue.

An individual can be killed based on a determination that he or she represents an imminent threat, and their capture "could not be physically effectuated during the relevant window of opportunity" or if the country where the individual is located declined to "consent to a capture operation", according to the

white paper. Also relevant to the question of resort to lethal force would be whether a capture operation would pose an “undue risk” to US personnel. The paper does not elaborate on what would amount to “undue risk.”

Finally, the paper states that the decision to kill the individual would have to comply with the “four fundamental law of war principles”, necessity, distinction, proportionality, and humanity. Under this framework, the Justice Department adds, the USA would “be required to accept a surrender if it was feasible to do so”. The white paper does not elaborate on how surrender might be offered or recognized in the world of remote-controlled drone attacks.

5. A ‘Kill Court’ is Not a Solution

If “global war” thinking hadn’t permeated so much of the way the USA thinks and talks about how to deal with the threat of terrorism, the proposal by some to establish a special court that would secretly review and approve government proposals to kill US citizens would immediately be rejected as a non-starter that misses the point.

As discussed above, the general rule is that lethal force is only lawful when, under international human rights law, it is necessary to prevent a truly imminent threat to life. If there is time for the government to go to a court to seek and obtain judicial approval for killing a particular person, then by definition the threat can’t ever be so imminent that the use of lethal force would be lawful under the general “law enforcement” standards. On the other hand, if the use of drones or other means for “targeted killings” was properly restricted to attacks on valid military targets in the heat of battle of hostilities in an actual armed conflict, it is not clear that even the proponents of the secret drone death-warrant courts would still regard them as practical or necessary. It seems likely that it is only because the administration is currently claiming for itself such a broad authority to kill outside of battlefield situations, and with such little transparency, that some have responded with the “solution” of a secret drone court to approve the killings.

The very fact a secret court to approve secret and officially denied drone killings, including of US citizens, could be viewed as a matter worthy of serious public debate is a chilling marker of just how far the “global war” way of thinking about countering terrorism corrodes the most basic human rights principles and values. What is urgently needed is not blind faith in secret courts, but full public disclosure and debate about the substantive issue: the implications of the sweeping scope the Obama administration is claiming to maintain “kill lists” and carry out other “targeted killings” without regard to human rights.

6. Recommendations for Reform

In light of the continuing lack of official information about US drone policy and its implementation, which precludes accountability for violations of international human rights law, Amnesty International reiterates its calls on the US administration, Congress and the judiciary:

- To disclose further legal and factual details about US policy and practices for so-called “targeted killings,” “signature strikes,” and “Terrorist Attack Disruption Strikes,” including the full legal memorandum that the white paper apparently summarized, as well as the names and other relevant information about individuals it knows have been killed in such strikes, its estimates of the total number of deaths, the number of civilians killed, and its criteria for making such assessments.
- To end claims that the US government is authorized by international law to use lethal force anywhere in the world under the theory that it is involved in a “global war” against al-Qa’ida and other armed groups and individuals, and to withdraw the 2001 Authorization for Use of Military Force.

- To recognize the application of international human rights law to all US counterterrorism operations, including those outside US territory.
- To bring US policies and practices in line with the USA's international human rights obligations, particularly, by:
 - Ensuring that any use of lethal force outside of specific recognized zones of armed conflict complies fully with the USA's obligations under international human rights law, including by limiting the use of force in accordance with UN standards for the use of force in law enforcement;
 - Ensuring that any use of lethal force within a specific recognized zone of armed conflict complies fully with the USA's obligations under international human rights and humanitarian law, including by recognizing and respecting the rule that if there is doubt as to whether a person is a civilian, the person is to be considered a civilian.
 - Ensuring independent and impartial investigations in all cases of alleged extrajudicial executions or other unlawful killings, respect for the rights of family members of those killed, and effective redress and remedy where killings are found to have been unlawful.

7. What the Senate Judiciary Committee Can Do

- Press the Obama administration to publicly disclose further legal and factual details
- Ensure that the US government follows international human rights law and, in the exceptional circumstances where it applies, international humanitarian law as well.
- Ensure that any legislation meets the US government's obligations under international human rights law
- Ensure that any legislation does not discriminate on the basis of citizenship. International human rights law explicitly prohibits discrimination on grounds of national origin when it comes to respect for the rights to life, to liberty and to fair trial
- Reject calls for a "kill court," but require the administration to stop blocking judicial review of "targeted killings"; and ensure independent and impartial investigations in all cases of alleged extrajudicial executions or other unlawful killings; respect for the rights of family members of those killed; and effective redress and remedy where killings are found to have been unlawful.

We respectfully refer you to the Amnesty International reports *"USA: 'Targeted Killing' Policy Violates the Right to Life"* (Index AMR 51/047/2012) and *"The Devil in the (Still Undisclosed) Detail: Department of Justice 'White Paper' on the Use of Lethal Force Against U.S. Citizen's Made Public"* (Index AMR 51/006/20123) for more detailed information, including all citations.

Thank you for the opportunity to testify on this important human rights issue.

April 16, 2013

The Honorable Dick Durbin
 United States Senate
 Committee on the Judiciary
 Chair of the Subcommittee on The Constitution, Civil Rights, and Human Rights
 224 Dirksen Senate Office Building
 Washington, DC 20510

Dear Senator Durbin,

Please consider this letter as comment for the record on the upcoming hearing, *Drone Wars: The Constitutional and Counterterrorism Implications of Targeted Killing*.

When armed with Hellfire Missiles or other high explosive ordnance, unmanned aerial vehicles (UAVs or drones) are instruments of war. Their use is governed by a longstanding body of international law that includes the United Nations Charter, the Geneva Conventions, the Nuremberg Principles, and the Universal Declaration of Human Rights. While they are cheaper to operate and reduce human risks for the attacker, their range of permissible use is no different than piloted aircraft engaged in aerial bombardment.

The body of international law that constitutes the rules of warfare is not simply a bludgeon with which to punish transgressors. It represents humankind's best moral judgment in the maintenance of a just, peaceful, and orderly world. It was largely developed under the leadership of the United States. It is disheartening to peace loving people around the world that the United States has now developed a new set of rules for itself that are more permissive in the use of violence and clearly fall outside the boundaries of the law. To our adversaries, it is a green light to employ any violence to gain advantage. If the world's foremost military power is above the law, its constraints apply to no one.

The U.S. assertion of a global battlefield in the conduct of its "war on terror" amounts to rhetoric. We are engaged in but one recognized area of armed conflict – Afghanistan. Elsewhere, the use of drone strike warfare is governed by the U.N. Charter which permits the unilateral use of military force only as a counter to military aggression or the imminent threat of military aggression. A state may also use military force if authorized by the Security Council or at the behest of a legitimate government in a recognized armed conflict zone. A nation that uses military force against another, absent all of these conditions, has committed military aggression. Such action is recognized in the Nuremberg Principles as "the supreme international crime" insofar as ensuing crimes of war are only made possible by the initial act of aggression.

The above conditions are not present in Pakistan and it is increasingly apparent that U.S. strikes are unwelcome. Sherry Rehman, Pakistan's ambassador to the United States, has explicitly condemned drone strikes as counterproductive and a violation of its sovereignty. The chief justice of Peshawar's high court, Dost Muhammad Khan recently concurred. He noted that a state of armed conflict does not exist in northwest Pakistan and therefore human rights law is the rule and all those killed in drone strikes are civilians. He characterized any secret consent to foreign drone strikes as illegal and unconstitutional.

Such secret consent can be forged in surreptitious deals that are unethical and designed to deceive the public. In 2004, the first CIA drone strike in Pakistan killed Nek Muhammad. He led a popular rebellion and fought the Pakistani army in the Federally Administered Tribal Areas. He was elusive and his success frustrated Pakistani authorities. While the 2001 Authorization to Use Military Force (AUMF) extends only to those “nations, organizations, or persons [that] planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001”, the U.S. agreed to take out Pakistan’s domestic adversary in exchange for greater latitude in conducting drone strikes on targets of its own choosing. In the aftermath, the Pakistani military falsely claimed that its own forces had killed Muhammad to avoid the backlash of public opinion. Meanwhile, the U.S. has gone on to launch hundreds of drone strikes, declining for years to acknowledge the actions. When the program finally became undeniable, it proceeded to deceive its own populace as to the number and nature of casualties. But it cannot deceive the Pakistani people who have first-hand knowledge of U.S. drone strikes, and harbor growing animosity as a result.

Outside of a war zone, peacetime rules must apply in the pursuit of criminal suspects, including those suspected of involvement in terrorism. A state may not resort to lethal force unless there exists an imminent threat to life. Even then, military force is too blunt an instrument and civilian casualties resulting from drone strikes bear this out. According to the Bureau of Investigative Journalism, as many as 884 civilians have been killed in Pakistan alone and at least 168 are known to have been children. Those innocent victims have been denied their most fundamental right to “life, liberty, and security of person” as guaranteed by Article III of the Universal Declaration of Human Rights.

There is much yet to be learned about the drone strike program, but there are already known elements that are patently illegal. The “double tap” strikes, successive strikes that target victims of the initial strike and their rescuers, are a violation of internationally accepted rules of war. The Geneva Conventions protect wounded persons who are clearly out of the fight from further harm. They also protect all those in the act of lending assistance regardless of their combatant status or “value” as a military target. This heinous practice, if proven to be deliberate, demands accountability. It tears at the fabric of civilization and has been properly condemned by the United States as terrorism when practiced by others.

Neither the “signature strikes”, those that target people for suspicious patterns of behavior, nor the Obama Administration’s absurdly broad categorization of all military-age males as combatants can be justified outside of a war zone. Under Article 10 of the Universal Declaration of Human Rights; “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations and of any criminal charges against him”. This right should not be dismissed as aspirational, especially by nations like the United States that have excellent conventional capabilities of self defense. It must also be remembered that the United States is a signatory to each of the treaties referenced above and, under Article VI of the U.S. Constitution, they are the supreme law of the land.

Even in an area where a state of war does exist, drone strikes must conform to principles of distinction and proportionality. Distinction, covered by the 1977 Protocol I addition to the Geneva Conventions, requires that parties to conflict must distinguish between civilians and combatants and direct their operations only against military objectives. Article 50 of the Protocol specifies that when there is doubt, a person shall be considered a civilian. Proportionality, put forth in the 2002 Rome Statute of the International Criminal Court, criminalizes intentionally launching an attack in the knowledge that it will cause incidental loss of life or injury to civilians which would be clearly excessive in relation to

the anticipated military advantage. The advancement in surveillance technology offered by drones, and the secure atmosphere in which their pilots operate, would seem to assist in lifting the fog of war and allow for greater discretion in targeting, thus greater protection for civilian populations. But high numbers of civilian casualties suggest that the United States is little concerned with international law. Practices such as “signature strikes”, “double tap strikes”, and counting all military-age males as combatants suggest its disregard for innocents is wanton.

First hand accounts, reports from organizations such as the Bureau of Investigative Journalism, and leaked information from the White House itself, all indicate that the aforementioned violations have already occurred. The Subcommittee should begin under this assumption, and proceed with a subpoena of all legal memos that underpin the drone strike program as well as any records kept by the Administration regarding casualties and its rationale for strikes against individuals whose identities were known prior to strike. It should also subpoena, and treat as evidence, all available drone video footage (surveillance and forensic) related to drone strike assassinations. These materials are relevant to, and should be shared with, any and all United Nations investigations that are underway.

The Subcommittee must also address the Orwellian passages in the Department of Justice White Paper. Conclusory assertions – which negate commonly understood law enforcement or self-defense meanings – are made in regard to such key terms as “imminent threat” and “feasibility of capture” while “associated forces” and “informed high-level official” are not further defined. “Imminence”, as claimed in the White Paper, “does not require...clear evidence that a specific attack on U.S. persons and interests will take place in the immediate future”. It proposes that “certain members of al-Qa’ida (including any potential target of lethal force) are continually plotting attacks” and since “the U.S. government may not be aware of all al-Qa’ida plots as they are developing and thus cannot be confident that none is about to occur...the nation may have a limited window of opportunity within which to strike in a manner that has a high likelihood of success and reduces the probability of American casualties.” It goes on to say that “capture would not be feasible if it could not be physically effectuated during the relevant window of opportunity” or posed an “undue risk to U.S. personnel”.

The U.N. Charter, however, prohibits the unilateral use of military force except in self-defense. Under the Caroline Case, the necessity for self-defense must be “instant, overwhelming, and leaving no choice of means, and no moment for deliberation”. Only by removing the concept of immediacy from the word “imminence”, and by conflating the word “feasibility” with “expediency”, can the specious argument be made that drone strikes in Pakistan, Yemen, and Somalia are consistent with the law.

The White Paper makes no claims as to targeted individuals other than U.S. citizens who are senior operational leaders of al Qaeda or associated forces. While the rules it lays out for targeting such Americans fail to bear legal scrutiny because they are so loose and ill-defined, the criteria for foreign nationals may be even more lax since they do not enjoy the protections afforded by the Bill of Rights. The Subcommittee must bring those rules to light and determine their legality.

With regard to U.S. citizens, no executive action can supersede the Constitution. With particular attention to the Fifth and Sixth Amendments, the 1957 *Reid v. Covert* decision upheld an American citizen's right to due process and a jury trial while overseas. In delivering the Court's opinion, Justice Hugo Black wrote: “When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land.”

In *Al-Aulaqi v. Panetta*, a case pending before the U.S. District Court in Washington D.C., the survivors

of three Americans killed by drone strike in Yemen are seeking damages from the former Director of the C.I.A. and other government officials believed to have ordered or directed the attack. The families are represented by lawyers from the American Civil Liberties Union and the Center for Constitutional Rights who argue that outside of armed conflict, both the Constitution and international law prohibit killing without due process except as a last resort in the prevention of imminent death or serious bodily injury. The suit specifically cites violation of the Fifth Amendment right to due process, the Fourth Amendment prohibition of unreasonable seizure, and the ban on extra-judicial death warrants imposed by the Constitution's Bill of Attainder clause.

The U.S. practices of indefinite detention, interrogation, and adjudication have been ruinous to the nation's reputation and tragic for detainees in the "war on terror". America has had difficulty distinguishing terrorists, combatants, and innocents. Persons from all three categories have been swept up, mistreated, illegally rendered, held at black prison sites, and tortured. Initial attempts at kangaroo court justice were thwarted in 2004 by the Supreme Court in *Rasul v. Bush* which affirmed the right of Guantanamo prisoners to challenge their detention through habeas corpus petitions to U.S. Courts. In 2006, the Court ruled in *Hamdan v. Rumsfeld* that the Bush Administration military tribunals could not proceed because they violated the Uniform Code of Military Justice and the Geneva Conventions. In 2008, the Court again ruled that Guantanamo prisoners have the right to habeas corpus in *Boumediene v. Bush* following congressional attempts to restrict the right through the Detainee Treatment Act of 2005 and the Military Commissions Act of 2006. Open now for over eleven years, 166 detainees still languish at Guantanamo with many on hunger strike despairing of endless confinement. Over half have been cleared for release, but they remain because they are deemed too dangerous or because there is no safe place for their repatriation. In 2009, an ACLU lawsuit forced the release of a report by CIA Inspector General John Helgeson which detailed interrogation abuses. It warned of potential legal consequences including the possibility of trials for war crimes. Speculation is high that extra-judicial assassination by drone strike has become a convenient substitute for problematic detentions and trials.

In considering the counterterrorism implications of targeted killing by drone strike, it stands to reason that civilian casualties will increase the likelihood of asymmetric retaliation since America has no current rival to its military might. That drone strikes are seen as cowardly throughout the world increases that likelihood. We must also bear in mind that even when we kill known militants, we are making new enemies. The men we kill have friends and families who hold them in the same regard that we hold our own soldiers. They are courageous defenders of their country, their culture, and their way of life. Yemen has been on the receiving end of more drone strikes than any country besides Pakistan. Yet by CIA Director John Brennan's assessment, al-Qaeda has metastasized in areas of the world it didn't previously exist. Allegiance to al-Qaeda in the Arabian Peninsula (AQAP) has more than tripled since drone strikes began there in 2002. Retired General Stanley McChrystal has recognized that drones are perceived as cowardly and said they are "hated on a visceral level".

In a recent letter coordinated by the Atlantic Council and the Project on Middle East Democracy, thirty-one foreign policy experts and former diplomats wrote to President Obama urging re-evaluation of U.S. policy toward Yemen. Regarding security it said; "[T]he increased reliance on drones undermines our long-term interest in a stable, secure, and sustainable partner in Yemen. A growing body of research indicates that civilian casualties and material damage from drone strikes discredit the central government and engender resentment towards the United States. Where drone strikes have hit civilians, news reports and first hand accounts increasingly indicate that affected families and villages are demonstrating and chanting against the Yemeni and US government. This creates fertile ground for new recruits and sympathizers who might provide safe haven or direct support to AQAP and its local affiliate, Ansar al-Sharia."

The February 27, 2013, House Judiciary Committee hearing on targeted drone killings was a mockery of fact-finding and legal analysis. The four witnesses, who all write for the same "Lawfare" blog, concurred that the drone strike program is lawful and constitutional. Any differences espoused were minor; whether there should, or even could, be review of drone strikes outside of the executive branch, whether that review could or should be prospective or retrospective, and whether any potential review might be congressional or judicial in nature. Their primary objective seemed to be to persuade Congress to codify the program in a form resembling its current immoral and illegal practice.

Credibility for the upcoming Senate Judiciary Subcommittee hearing rests on assembling a balanced panel of witnesses. Any or all of the following experts would contribute greatly to the deliberations. Each has written extensively on the topic and is eminently qualified:

- Mary Ellen O'Connell – University of Notre Dame
- Sarah Knuckey – New York University School of Law
- James Cavallaro – Stanford Law School
- Glenn Greenwald – Constitutional lawyer and columnist for the Guardian
- Marjorie Cohn – Thomas Jefferson School of Law

Early in this letter, it was noted that the United States is engaged in only one recognized area of armed conflict – Afghanistan. That is not to say that the decision to go war was wise or that our continued military presence is efficacious. The legality of the 2001 invasion is questionable because the United States did not exhaust less violent means of apprehending the al Qaeda perpetrators of 9-11 and the use of military force was disproportionate to both the initial attack and residual threat. The proposition that we are safer is dubious. That innocents have suffered and died is certain.

More killing, even that of known militants, is not helpful. Violence begets more violence. When America is perceived to be a just nation, it ceases to be a target for terrorism. The best recommendation that could come from the Senate Judiciary Subcommittee on The Constitution, Civil Rights, and Human Rights would be for America to ground all armed drones and join the International Criminal Court. The struggle to end terrorism is properly an international police endeavor and The Hague the proper venue for trial.

Sincerely,
Mike Madden and Coleen Rowley

Endorsed by the following organizations (Minnesota based unless otherwise noted):

Veterans for Peace Chapter 27
Minnesota Anti-War Committee
Twin Cities Peace Campaign
Little Falls OCC-U-PIE
Itasca 9/11 Truth and Justice
The National Lawyers Guild-Grand Arizona Chapter, Phoenix, AZ
Fairmont Minnesota Peace Group
Presentation Sisters Social Justice Team, Aberdeen, SD
Mankato Peace Vigil
Burnsville and Eagan Peace Vigils

Iraqi and American Reconciliation Project
 Grandmothers for Peace Twin Cities
 Anti-War Committee, Chicago, IL
 The West Suburban Faith-based Peace Coalition, Lombard, IL
 Middle East Peace Now
 Women Against Military Madness
 Catholic Peace Ministry, Des Moines, IA
 Interfaith Peacemakers of Edina
 Peace Fresno, Fresno, CA
 Southeast MN Alliance of Peacemakers
 International Action Center, New York, NY
 Voices for Creative Nonviolence, Chicago, IL
 Pax Christi Illinois
 Friends for a NonViolent World (FNVW)
 Veterans for Peace, Chapter 115

Signed by the following individuals (all of Minnesota unless otherwise noted):

Aaron Tovo, St. Paul
 Meredith Aby, Minneapolis
 Heidi Uppgard, Minneapolis
 Ross and Coleen Rowley, Apple Valley
 Robert and Jean Heberle, St. Anthony
 Larry Johnson, Golden Valley
 Jim Dooley, Hayward, WI
 Steve Clemens, Minneapolis
 Robin Hensel, Little Falls
 Marie Braun, MSW, Minneapolis
 John Braun, MSW, Minneapolis
 Chuck Turchick, Minneapolis
 Lisa A. Coons, Mankato
 Mel Thoresen, Grand Rapids/Deer River
 Dianne Post, Phoenix, AZ
 Gladys Schmitz, SSND, Mankato
 Roy and Suzan Koch, St. Paul
 Mellissa Koch, Minneapolis
 Dr. John E. Landgraf, St. Paul
 Dr. Elizabeth G. Burr, St. Paul
 Frank Goetz, Wheaton, IL
 Janice Ward and David Evenhouse, Marcell
 Anne Newhart, Minneapolis
 Judi Poulson, Fairmont
 Sister Kay O'neil and Sister Michelle Meyers, LeSuer
 Rich and Marian Van Dellen, Rochester
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 Tom Orne, Mankato
 Sister Alice Zachman, SSND, Mankato
 Gerald Ganann, Minneapolis

Greg and Lynn Lokken, Edina
 Molly Johanna Culligan, Red Wing
 Patty Guerrero, St. Paul
 Mary Beaudoin, St. Paul
 Linda M. Lewis, Department of the Attorney General (Retired), Hagerstown MD
 Bill Tilton, St. Paul
 Georgianne Nienaber, Author/Journalist, Pequot Lakes
 Thomas Dickinson, Minneapolis
 Paul Busch, St. Paul
 Bill Sorem, Minnetonka
 Jerry Kahlert, Inver Grove Heights
 Robert Palmer, Lakeville
 Tim Nolan, St. Paul
 William Rood, Rochester
 Augusto Braga, Rochester
 Darlene Coffman, Rochester
 Barbara Gerten, South St. Paul
 Jovne Kloeber, Prior Lake
 Nobuko Kudo, Attorney at Law, Lombard, IL
 Florence Steichen, St. Paul
 Bob Maegerlein, Rochester
 Pat Rolston, Cedar Rapids, IA
 Dixie Vella, Bloomington
 Sally Howland, Lisle, IL
 Renata Marroum, Wheaton, IL
 Sharon Sudman, St. Paul
 Georgianna Anderson, St. Paul
 Bob Levin, Portland, OR
 Katrina Lynn Sczesny, Fairbanks, AK
 Sarah Martin, Minneapolis
 Bob and Joy Johnson, Harmony
 Sister Teresa Ann Wolf, Director, Benedictine Multicultural Center, Watertown, SD
 Nick Mottern, Director of Know Drones, Hastings on the Hudson, NY
 Brother Martin Zatsnick, TOR, Dorothy Day Center, Loretto, PA
 Ruth Geraets, Aberdeen, SD
 Shirley Adler, Seattle, WA
 Sister Marilyn Dunn, Aberdeen, SD
 Robert Shumer, Eagan
 Charles Ripp, Oak Park, IL
 Dr. Cris Toffolo, Professor & Chair, Justice Studies Department, Northeastern Illinois University
 Richard Segers, Savage
 Retha Dooley, Sauk Centre
 Tom and Darlene White, Edina
 Mary Geraets, Aberdeen, SD
 Sally Sommers, Villa Park, IL
 Ann Freiburg, Lombard, IL
 Maggie J. Meehan, Fergus Falls
 Polly Mann, Minneapolis
 Ed Rowley, Rochester

Hank Kleiwer, Rochester
 Jean Chovan, Rochester
 Robert and Helen Schroeder, Rochester
 Carol Brunholz, Rochester
 Anne Scherer, Rochester
 Sherry Berg, Lanesboro
 Camille Russell, Fresno, CA
 Dan Yaseen, Fresno, CA
 Victor Magana, Fresno, CA
 Ken Hudson, Fresno, CA
 Gerry Bill, Fresno, CA
 Beverly Fitzpatrick, Fresno, CA
 Sharon Platto, Alexandria
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 Sister Marylyn Irrgang, SSND, Mankato
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 Sara Flounders, Co-Director, International Action Center, Philadelphia, PA
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 Gary W. King, PhD, Fridley
 Maryam Jamshidi, International Lawyer and Founder Muftah.org, Potomac, MD
 Marjorie Myers, Mankato
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 Gail Madden, St. Paul
 Andy Singer, St. Paul
 Andy Berman, VFP, St. Louis Park
 Steve Gates, VFP, Stillwater
 Mary McNellis, VFP, Stillwater
 Greg Hagen, VFP, Woodbury
 Bruce Berry, VFP, Minneapolis
 Dave Logsdon, VFP, Minneapolis
 Dave Culver, VFP, Hopkins
 John Sherman, VFP, Minneapolis
 Chante Wolf (Desert Storm Veteran), VFP Secretary, St. Anthony
 Wes Davey, VFP/IVAW, St. Paul
 Steve McKeown, VFP, Richfield

John Johnson, VFP, Richfield
Josh McKeown, VFP, Richfield
Todd Pierce, VFP, St. Paul
Barry Riesch, VFP, St. Paul
Judy Kupfer, Red Wing
Ed Castro Jr., Fresno, CA
Susan Nixon, Minneapolis
Walter Lentz, Minneapolis
Richard C. Bopp, West Coxsackie, NY
Michael Andregg, St. Paul
Ed and Judy Summersby, Boston, MA
Barbara Vaile, Minneapolis
Amber Garlan, St. Paul
Kathy Kelly, Chicago, IL
Bara Berg, M.D., St. Paul
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David Stamps, Ramsey
Phil Traynor, Fresno, CA
AJ Janssen, Washington County
Natalie Bayci, Joliet, IL
Bob Nechal, St. Paul
Bill Habedank, Red Wing
Kathy McKay, St. Louis Park
Dan La Vigne, Shoreview
Ryan Alan Simonson, Minneapolis
Carol White, Minneapolis
Karen A. Jackson, Woodridge, IL

**STATEMENT OF SHARED CONCERNS REGARDING U.S. DRONE STRIKES
AND TARGETED KILLINGS**

The undersigned human rights and civil rights groups urge the United States to take essential steps to ensure meaningful transparency and legal compliance with regard to U.S. targeted killing policies and practices, particularly those outside the internationally-recognized armed conflict in Afghanistan. In particular, we call on the administration to: publicly disclose key targeted killing standards and criteria; ensure that U.S. lethal force operations abroad comply with international law; enable meaningful congressional oversight and judicial review; and ensure effective investigations, tracking and response to civilian harm.¹

I. DISCLOSE LEGAL STANDARDS & CRITERIA

Commitment to the rule of law requires that the administration disclose the legal constraints on its lethal targeting operations. Greater disclosure of legal and policy standards, and procedural mechanisms, is a necessary prerequisite to informed assessment and debate by the U.S. public, policymakers charged with conducting oversight, and the international community.

President Obama acknowledged the need to lift the veil of secrecy on targeted killings in his most recent State of the Union address, during which he pledged to ensure that U.S. lethal targeting practices are made “more transparent to the American people and to the world.”² We urge the U.S. government to make good on the President’s stated commitment to greater transparency on this crucial issue. Refusal to clarify U.S. legal and policy standards will leave the administration vulnerable to challenges to the sincerity of its commitment to transparency and the rule of law.

We are confident it is possible to improve transparency without putting intelligence sources at risk or endangering genuine national security interests. In fact, improved transparency may serve national security by demonstrating the legal bases for targeted killing policies and practices.

In particular, we urge the administration to:

- Release to the public all Department of Justice, Central Intelligence Agency and Department of Defense memoranda that reflect the administration’s interpretation of operative law and policy concerning the lethal targeting of any person;

¹ Except where noted, all of the undersigned groups share the concerns expressed in this statement. Individual groups have raised additional concerns which are expressed elsewhere.

² Barack Obama, Remarks by the President in the State of the Union Address, Feb. 12, 2013, White House Office of the Press Secretary, *available at* <http://www.whitehouse.gov/the-press-office/2013/02/12/remarks-president-state-union-address>.

- Release to the public the counterterrorism manual reported to exist by the *Washington Post* on January 19, 2013 (with minimal redactions to protect legitimately secret information);³ and
- Disclose the legal criteria for identification of targets, including for placement on so-called “kill lists” and for subsequent targeting, and criteria for so-called “personality strikes,” “signature strikes” or Terrorist Attack Disruption Strikes (TADS).

II. ENSURE EFFECTIVE CONGRESSIONAL OVERSIGHT

All relevant committees, including the Armed Services, Foreign Relations and Foreign Affairs, Intelligence and Judiciary Committees, should be able to engage in meaningful oversight, and the administration should work cooperatively with these committees. To that end, the administration should provide all members of Congress access to past and future legal opinions and interpretations regarding targeting operations by the CIA and Joint Special Operations Command (JSOC). Moreover, the administration should answer requests by members of Congress for basic information that is a precursor to effective oversight. This would include, for example, Senator Wyden’s request for the names of all of the countries where the intelligence community has “used its lethal authorities.”⁴

III. DO NOT BLOCK JUDICIAL REVIEW

Judicial review is a central pillar of checks and balances. It is essential for accountability and transparency. Yet, the administration’s position is that judicial review is “not appropriate”⁵ in targeted killings cases and it has invoked broad interpretations of the political question and immunity doctrines, *Bivens* special factors, and the state secrets privilege to obstruct litigation.

We do not believe that accountability and transparency will be improved by recent proposals to establish a FISA-like court to sanction lethal targeting operations.⁶ On the contrary, a special targeted killing court would give a veneer of judicial review to decisions to launch lethal strikes without offering a meaningful check on executive power. Instead, we urge the administration to cease making broad claims of non-justiciability or

³ See Greg Miller, Ellen Nakashima & Karen DeYoung, “CIA drone strikes will get pass in counterterrorism ‘playbook,’ officials say,” *Washington Post*, Jan. 19, 2013, available at http://articles.washingtonpost.com/2013-01-19/world/36474007_1_drone-strikes-cia-director-playbook.

⁴ Open Hearing on the Nomination of John O. Brennan to be Director of the Central Intelligence Agency, United States Senate Select Committee on Intelligence, Feb. 7, 2013 at 58, available at <http://intelligence.senate.gov/130207/transcript.pdf>.

⁵ Jeh Johnson, “National Security Law, Lawyers and Lawyering in the Obama Administration,” Yale Law School, Feb. 22, 2012, available at <http://www.cfr.org/national-security-and-defense/jeh-johnsons-speech-national-security-law-lawyers-lawyering-obama-administration/p27448>; see also Eric Holder, Remarks at Northwestern University School of Law, Mar. 5, 2012, available at <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>.

⁶ Some of our organizations have described objections to these proposals. See, e.g., Zeke Johnson, “Why Drone Death Courts are a Terrible Idea,” Amnesty International USA Blog, Feb. 25, 2012, <http://blog.amnestyusa.org/us/why-drone-death-courts-are-a-terrible-idea/>; Gabor Rona, “The pro-rule of law argument against a ‘drone court,’” *The Hill*, Feb. 27, 2012, <http://thehill.com/blogs/congress-blog/judicial/285041-the-pro-rule-of-law-argument-against-a-drone-court>.

political question, to prevent cases alleging human rights or constitutional violations from being heard on their merits.

IV. TRACK & RESPOND TO CIVILIAN HARM

At his recent nomination hearing to be director of the CIA, John Brennan stated that the United States should publicly acknowledge mistaken killings of individuals or groups of individuals, in the interest of transparency.⁷ He later said that the administration should “make public the overall numbers of civilian deaths resulting from U.S. strikes targeting al-Qa’ida.”⁸ We agree and believe this disclosure is an essential first step toward ensuring accountability and redress.

At the same time, John Brennan and other senior administration officials have repeatedly said that civilian casualties from targeting operations outside of Afghanistan, and particularly from drone strikes, are “exceedingly rare.”⁹ Senator Dianne Feinstein has said that civilian casualties are in the “single digits” each year.¹⁰ We are concerned about the factual basis for these claims in light of *prima facie* evidence and numerous credible reports that civilian casualties have been significantly higher than “single digits” each year.¹¹ In the context of drone strikes, remote operation makes battle damage assessments and proper post-strike investigations difficult, and the administration has provided no evidence that it can properly assess how many civilians were harmed.

Based on a review of a wide range of civilian casualty estimates, we are especially concerned that the administration may be consistently undercounting and overlooking civilian casualties. Moreover, the administration may be employing an overbroad definition of “combatant” or “militant” that would lead it to undercount civilian casualties.¹² These concerns heighten the need to ensure there are effective mechanisms to track and respond to civilian harm. Moreover, in the context of armed conflict, a track record of undercounting civilian casualties may cause the United States to make an inaccurate assessment of the proportionality element of lethal action—itsself a violation of the laws of war. (We describe the appropriate legal standards in and outside of armed conflict in Section V *infra*).

⁷ Open Hearing on the Nomination of John O. Brennan to be Director of the Central Intelligence Agency, United States Senate Select Committee on Intelligence, *supra* note 4, at 57-58.

⁸ Reuters, “Nominee for CIA Chief Says Casualties Figures Should be Public,” Feb. 15, 2013, *available at* <http://www.reuters.com/article/2013/02/15/us-obama-nominations-brennan-drones-idUSBRE91E18N20130215>.

⁹ John O. Brennan, Speech at Woodrow Wilson International Center for Scholars, Apr. 30, 2012, *available at* <http://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy>.

¹⁰ Open Hearing on the Nomination of John O. Brennan to be Director of the Central Intelligence Agency, United States Senate Select Committee on Intelligence, *supra* note 4 at 6.

¹¹ For a comprehensive review of civilian casualty reporting by media and non-media sources, see The Bureau of Investigative Journalism, “Covert Drone War,”

<http://www.thebureauinvestigates.com/category/projects/drones/> (updated regularly).

¹² These terms are used in many media reports and in common parlance to denote who the U.S. government believes is targetable.

The reported practice of so-called signature strikes, based on observation of certain patterns of behavior and other “signatures,” adds to these concerns. Signature strikes do not appear to require specific knowledge about an individual’s participation in hostilities or an imminent threat.¹³ Since their identity is unknown, even during the strike, these targeted individuals may be confused with civilians who cannot be targeted directly as a legal matter.

In an armed conflict, individuals are entitled to a presumption of civilian status, which the practice of signature strikes may effectively deny, leading to direct attacks on civilians and disproportionate civilian casualties, in violation of international humanitarian law. Outside of armed conflict, this concern would be heightened, since presupposing targetability would be even more incompatible with human rights standards. It would also increase the likelihood that the U.S. government systematically underestimates civilian casualties. A refusal to acknowledge civilian harm compounds anger in impacted communities and denies victims the justice they deserve.

We therefore urge the administration to:

- Publicly describe the existing processes to prevent and mitigate civilian harm from targeting operations (including with drone technology), e.g., civilian protection protocols and training given to drone operators;
- Disclose the criteria used to determine civilian and “militant” or “combatant” status;
- Disclose government counts of deaths and injuries resulting from targeting operations (particularly those outside of Afghanistan) including counts of civilian casualties, deaths of “operational leaders” or “high-value targets,” and deaths of individuals categorized as “militants” or “combatants”;
- Disclose what “signatures” are considered sufficient to authorize a strike and in what circumstances;
- Clarify and disclose standards for post-strike procedures to investigate the legality of strikes and credible reports of civilian harm, and ensure they do not presumptively categorize individuals killed or injured as “militants” or combatants;
- Ensure that mechanisms for civilian victims or their families to obtain redress, including recognition of harm and compensation or amends, are practically available and effective.

V. ENSURE COMPLIANCE WITH INTERNATIONAL LAW

Senior officials have claimed that the administration applies international humanitarian law to its targeted killing program.¹⁴ However, unlike international human rights law, the

¹³ See Cora Currier and Justin Elliott, “The Drone War Doctrine We Still Know Nothing About,” ProPublica, Feb. 26, 2013, available at <http://www.propublica.org/article/drone-war-doctrine-we-know-nothing-about>.

¹⁴ See, e.g., Jeh Johnson, Remarks at Yale Law School, *supra* note 5 (“We must apply, and we have applied, the law of armed conflict, including applicable provisions of the Geneva Conventions and

circumstances under which international humanitarian law applies are narrow and exceptional. There must be an armed conflict: hostilities must be between the United States and a group that is sufficiently organized and must reach a level of intensity that is distinct from sporadic acts of violence.¹⁵ Outside of an armed conflict, where international human rights law applies, the United States can only target an individual if he poses an imminent threat to life and lethal force is the last resort.¹⁶ A key preliminary issue is thus whether or not the United States is using lethal force as part of hostilities in an armed conflict.

Even when the United States uses force as part of hostilities in an armed conflict, there are important legal constraints on its targeting operations. The administration's statements have raised fundamental concerns about whether it recognizes these constraints and complies with international law. We describe three of these concerns below, although they are not exhaustive. The first two involve concerns pertaining to how the U.S. chooses particular targets; the third involves concerns pertaining to the legality of U.S. use of force in other states.

A. The administration's criteria for determining that it can lawfully engage in lethal targeting of a particular individual or groups of individuals.

The administration should ensure that its standards and criteria for determining that it can directly target a particular individual using lethal force are consistent with international law. It should also disclose those standards so that Congress, the public, and other nations can assess them. Because of the impact that U.S. policy will have on global standard setting on the use of drones in targeted killings, it is critically important that U.S. legal standards be fully disclosed.

There are troubling indications that the U.S. regards an individual's affiliation with a group as making him or her lawfully subject to direct attack.¹⁷ This raises serious questions about whether the U.S. is operating in accordance with international law. Under

customary international law, core principles of distinction and proportionality, historic precedent, and traditional principles of statutory construction").

¹⁵ International humanitarian law would also apply if a state intervenes in armed conflict at the request of another state engaged in armed conflict. For a discussion of threshold criteria for armed conflict, see Sylvain Vit , "Typology of armed conflicts in international humanitarian law: legal concepts and actual situations," *International Review of the Red Cross*, vol. 91, no. 873 (March 2009). See also Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 1(2), 1125 U.N.T.S. 609, entered into force Dec. 7, 1978 (reflecting these criteria). President Obama has recommended ratification of the treaty. See Press Release, White House Office of the Press Secretary, Fact Sheet: New Actions on Guantanamo and Detainee Policy, March 7, 2011, available at <http://www.whitehouse.gov/the-press-office/2011/03/07/fact-sheet-new-actions-guant-namo-and-detainee-policy>.

¹⁶ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, Study on Targeted Killings, ¶32, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010), available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf>.

¹⁷ See Columbia Law School Human Rights Clinic & Center for Civilians in Conflict, *The Civilian Impact of Drones* (2012), 75 (describing reports and administration statements).

international humanitarian law, applicable in the narrow and exceptional circumstance of armed conflict, the U.S. can directly target only members of the armed forces of an enemy, military objectives, or civilians directly participating in hostilities.¹⁸ U.S. standards should reflect a presumption that unidentified individuals are civilians with protection from direct attack, unless and for such time as they take a direct part in hostilities.¹⁹

Outside of an armed conflict, where international human rights law applies, any use of force must be both necessary and proportionate. Intentional lethal force may only be used where strictly necessary to prevent an imminent threat to life.²⁰ To assess “imminence” under human rights law and in the context of determining how force can be used outside an armed conflict, the U.S. should look only to human rights law sources. Some administration statements imply that the U.S. government may be attempting to borrow interpretations of “imminence” from the law regarding resort to the use of force (*jus ad bellum*), which involves a wholly separate inquiry into whether a state can lawfully use force in violation of another state’s sovereignty, to defend itself against an imminent threat (see Section V.C *infra*).

B. The administration’s criteria for determining that a group is an “associated force” of Al Qaeda, and the implications of that determination.

The administration has stated that it is in an armed conflict with Al Qaeda and “associated forces,” which it defines as organized armed groups that have “entered the fight alongside al Qaeda” and are “co-belligerent[s] with al Qaeda in hostilities against the United States or its coalition partners.”²¹ The administration’s failure to define what specific organizational features or conduct would lead a group to be classified as an associated force raises concerns that this results in an aggressive and indefinitely expansive scope of targeting authority.

¹⁸ See Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), art. 51(3), June 8, 1977, 1125 U.N.T.S. 3, 23. The U.S. is not party to Additional Protocol I, but this provision is regarded as customary international law. See ICRC, Customary International Humanitarian Law Database, Rule 6, <http://www.icrc.org/customary-ihl/eng/docs/home>; Michael Schmitt et al., The Manual on the Law of Non-International Armed Conflict with Commentary, § 2.1.1.2 (2006). See also Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 13.3, 1125 U.N.T.S. 609, entered into force Dec. 7, 1978.

¹⁹ Article 50(1) of Additional Protocol I provides: “In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.” The ICRC regards this provision as customary international law. See “Customary International Humanitarian Law Database, Rule 6(D),” International Committee of the Red Cross, http://www.icrc.org/customary-ihl/eng/docs/v1_rule6. One recent U.S. military manual reflects this presumption, while others urge a case-by-case approach. See, e.g., “ATP 3-37.31: Civilian Casualty Mitigation,” Headquarters, Department of Army, (2012), para. 1-2, <http://www.fas.org/irp/doddir/army/attp3-37-31.pdf>, (“If there is any doubt, Army forces consider a person to be a civilian.”); International and Operational Law Department, The Judge Advocate General’s Legal Center and School, US Army, *Operational Law Handbook* 21 (2012).

²⁰ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, Study on Targeted Killings, *supra* note 16 at ¶32.

²¹ Jeh Johnson, Remarks at Yale Law School, *supra* note 5.

The administration should disclose the groups it believes to currently constitute associated forces and the criteria for determining whether a group is an associated force. It should set forth the legal basis for considering the United States to be at war with “associated forces” of Al Qaeda that did not participate in the September 11, 2001 terrorist attacks. Moreover, it should clarify who it believes is lawfully targetable with lethal force within such “associated forces.”

C. The administration’s concept of imminence, in justifying its resort to the use of force in self-defense.

Some of the undersigned groups are concerned that the administration’s statements appear improperly to conflate the question of sovereignty with the question of whether use of force against a particular individual is lawful.²² International law prohibits the use of force in the territory of other states, except in narrow circumstances, including self-defense and consent. The use of force may be a lawful act of self-defense in response to an armed attack or imminent threat of armed attack. Some scholars believe a state may use force in these circumstances even without a host state’s consent, for so long as the host state is unwilling or unable to take appropriate action. The resort to the use of force in self-defense (*jus ad bellum*) relates to issues of state sovereignty; any U.S. operations would still need to satisfy the applicable requirements of humanitarian law (*jus in bello*) and human rights law.

Moreover, John Brennan has implied that the “imminent threat” threshold “should be broadened in light of the modern-day capabilities, techniques, and technological innovations of terrorist organizations.”²³ This and other statements by administration officials, and a leaked Department of Justice white paper regarding the legality of targeting a U.S. citizen,²⁴ imply that the broadening of the term “imminent threat” could expand the situations in which lethal force would be justified based on a perceived danger that may be realized at an undefined point in the future; or based on a group’s generalized intent to use force against the United States, even if the U.S. government is not aware of that group’s planning toward a specific attack against the United States.²⁵ These

²² Some of the undersigned groups do not, as an institutional matter, take a position on *jus ad bellum* issues.

²³ John O. Brennan, “Strengthening our Security by Adhering to our Values and Laws,” Harvard Law School, Sept. 16, 2011, available at <http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an>.

²⁴ U.S. Department of Justice, Lawfulness of Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa’ida or An Associated Force, Nov. 8, 2011, available at http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf.

²⁵ Eric Holder, Remarks at Northwestern University School of Law, *supra* at note 5 (“The evaluation of whether an individual presents an ‘imminent threat’ incorporates considerations of the relevant window of opportunity to act, the possible harm that missing the window would cause to civilians, and the likelihood of heading off future disastrous attacks against the United States”); Department of Justice, White Paper: Lawfulness of a Lethal Operation Directed Against a U.S. Citizen, *supra* at note 24 (“[I]mminece must incorporate considerations of the relevant window of opportunity, the possibility of reducing collateral damage to civilians, and the likelihood of heading off future disastrous attacks on Americans”).

interpretations of imminence would be inconsistent with international law regarding resort to the use of force.

As senior administration officials have recognized, U.S. targeted killing policies and practices will set a precedent for other nations, particularly as weaponized drone technology becomes more widely available. Lowering the threshold for the use of force outside armed conflicts could be in breach of international law, set a dangerous precedent, and weaken the U.S. government's ability to argue for constraints on lethal targeting operations of other states.

American Civil Liberties Union
Amnesty International
Center for Human Rights & Global Justice, NYU School of Law*
Center for Civilians in Conflict
Center for Constitutional Rights
Global Justice Clinic, NYU School of Law*
Human Rights First
Human Rights Institute, Columbia Law School
Human Rights Watch
Open Society Foundations

** This statement does not represent the institutional views of NYU School of Law*

Statement of Mary Ellen O'Connell

University of Notre Dame

to the

Subcommittee on the Constitution, Civil Rights and Human Rights
Committee on the Judiciary
United States Senate

I appreciate the invitation to submit this statement to the Committee on the topic of United States targeted killings beyond zones of armed conflict. This statement addresses two topics: Topic one examines the principal legal justifications presented by government officials for targeted killing. The conclusion here is that the asserted legal justifications are seriously deficient. Topic two considers possible reasons as to why government lawyers have provided such deficient advice to officials responsible for targeted killing programs.

I. Asserted Justifications for Killing Beyond Battle Zones

By now it is clear that the critical issue respecting targeted killing centers on the killing of thousands of people and hundreds of children beyond armed conflict zones from November 2002 until the present. These killings involve the use of military force—bombs and missiles, whether deployed by drones or conventional means. Since 9/11, the United States has engaged in armed conflict in Afghanistan, Iraq, and Libya. The United States has also deployed military force without justification under international law in Yemen, Somalia, and Pakistan. The three asserted bases offered by government officials to justify these killings are:

1. World wide armed conflict against “militant” groups
2. Self-defense under Article 51 of the United Nations Charter
3. Consent of local government authorities

World Wide War

Every human person possesses an inherent right to life. As a consequence, governments are restricted in the right to exercise lethal force. In peace, a state may only take a human life when “absolutely necessary in the defense of persons from unlawful violence.”¹ The United Nations Basic Principles for the Use of Force and Firearms by Law Enforcement Officials (UN Basic Principles), which are widely adopted by police throughout the world, provide in Article 9:

Law enforcement officials shall not use firearms against persons except in self-defense or defense of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.²

To get away from these restrictions, the Bush administration argued within days of the 9/11 attacks that the country was in a, “global war on terror,” that allowed the killing or detention of suspected members of al-Qaeda, the Taliban and other militant non-state actor groups wherever found in the world.

¹ *McCann & Others v. United Kingdom*, 21 Eur. Ct. H.R. 97 (ser. A) (1995); *see also* *Montero-Aranguren et al. (Detention Center of Catia) v. Venezuela*, Inter-Am Ct. H.R. (ser. C) No. 150, ¶ 69 (July 5, 2006).

² United Nations Basic Principles, Eighth U.N. Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, Aug. 27-Sept. 7, 1990, *available at* <http://www2ohchr.org/english/law/firearms.htm>.

President Obama was highly critical of the “global war” paradigm as asserting a right to limitless war in time and space. Upon taking office, however, his legal and policy advisers have adopted basically the same policy with a different label. The only principal difference is that now the policy of killing with military force regardless of any right to resort to force or the presence of armed conflict hostilities is less internally coherent than the Bush administration policy. State Department Legal Adviser, Dean Harold Koh, argued in 2010, that “*U.S. targeting practices . . . comply with all applicable law, including the laws of war*”³ and that “as a matter of international law, the United States is in an armed conflict with al-Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-defense under international law.”⁴ Koh has insisted to the author that the Obama administration is not using the global war justification of the Bush administration. In his view, the “armed conflict against al Qaeda” and other groups is a distinctive legal argument to justify targeted killing. With all due respect, the difference between the two constructs is imperceptible. While it may seem to be an improvement to wage war against people rather than a concept like terrorism that will never end, terrorist groups will never come to an end either.

Moreover, it is not really a claim that the U.S. is in a worldwide war. The administration has introduced the gloss that it will only carry out this killing in states that are “unable or unwilling” to act against certain individuals or groups. The president

³ Harold Hongju Koh, Legal Advisor, State. Dept., The Obama Administration and International Law, Annual Meeting the American Society of International Law (Mar. 25, 2010), at 10, *available at* <http://www.state.gov/s/l/releases/remarks/139119.htm> (emphasis in the original).

⁴ *Id.*

apparently will not be authorizing drone strikes in the United Kingdom, Germany, or the United States. Thus, the legal justification is not based on persons being fighters in an armed conflict; it is based on persons being present in states with weak governments. Even if this made any sense from a policy perspective, there is no international legal right to exercise military force on this basis.

Presidents and legal advisers do not have the authority to posit what is and is not an armed conflict. “Armed conflict” is an important term in international law. The exceptions to the human right to life—when a killing is not an arbitrary deprivation of life—differ depending on whether authorized persons are acting during an armed conflict or outside of armed conflict. International humanitarian law is applicable in situations of armed conflict and occupation.⁵ Certain states have accepted the obligation to grant asylum to persons fleeing “armed conflict.”⁶ International law defines what an armed conflict is for these and other important areas of international law. The definition was not well known but has now been thoroughly researched in a report of the International Law Association’s Committee on the Use of Force.⁷ The Committee consisted of eighteen

⁵ Article 2(4) of the UN Charter states that all UN member States must refrain “from the threat or use of force . . . in any other manner *inconsistent* with the Purposes of the United Nations.” U.N. Charter art. 2, para. 4 (emphasis added). One of the purposes of the UN is to “achieve international cooperation in solving international problems of [a] . . . humanitarian character, and in promoting and encouraging respect for human rights . . . for all . . .” *Id.* art. 1, para. 3. Taken together, these articles of the UN Charter carve out an exception for the use of force in humanitarian interventions.

⁶ See Council of Europe Directive 2004/83/EC of 29 April 2004, Official Journal of the European Union L 304; see also Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 14, ¶ 1, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) (“Everyone has the right to seek and to enjoy in other countries asylum from persecution.”).

⁷ See USE OF FORCE COMM., INT’L LAW ASS’N, FINAL REPORT ON THE MEANING OF ARMED CONFLICT IN INTERNATIONAL LAW 2 (2010), available at <http://www.ila-hq.org/en/committees/index.cfm/cid/1022>. For armed conflict to exist, organized armed groups must engage in fighting of some intensity.

scholars from fifteen countries in five regions of the world. The Committee looked at a variety of evidence of the definition, including the practice of states with respect to over 300 situations of violence since the Second World War.⁸ The international community generally recognizes a situation as one of armed conflict if there are, at a minimum, two or more organized armed groups engaged in fighting of some intensity. Since 9/11, the United States has been engaged in armed conflict in Afghanistan, Iraq, and Libya. It has carried out targeted killing in Pakistan, Somalia, and Yemen separate from any armed conflict hostilities.

Article 51 Self-Defense⁹

Article 2(4) is properly interpreted as prohibiting all uses of force above a certain minimal level. Minimal uses of force such as firing a single shot across an international boundary might violate the principle of non-intervention, but is probably too minor to come within the purview of Article 2(4). The Charter contains two exceptions to this general ban on virtually all uses of force: In Chapter VII, the Security Council is given authority to act in cases of threats to the peace, breaches of the peace and acts of aggression. It may order measures to maintain or restore international peace and security, including mandating or authorizing the use of force by member states.

Chapter VII also provides in Article 51 that states may respond in self-defense “if an armed attack occurs” until the Security Council acts.¹⁰ The evident restrictions in this

⁸ *See id.*

⁹ A great deal has been written on this topic. Three leading texts in English on the general involved relevant to self-defense, are YORAM DINSTEIN, *WAR, AGGRESSION, SELF-DEFENCE* (5th ed., 2011); OLIVIER CORTEN, *THE LAW AGAINST WAR: THE PROHIBITION ON THE USE OF FORCE IN CONTEMPORARY INTERNATIONAL LAW* (2010), and CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* (3d ed. 2008). See also, more specifically regarding U.S. targeted killing, Mary Ellen O’Connell, *The Choice of Law Against Terrorism*, 4 J. NAT’L SEC. L. & POL’Y 343 (2010).

Article have come under some pressure, especially from academics in the United States.

But in 2005 the Charter was unanimously reconfirmed at the UN World Summit:

78. We reiterate the importance of promoting and strengthening the multilateral process and of addressing international challenges and problems by strictly abiding by the Charter and the principles of international law, and further stress our commitment to multilateralism.

79. We reaffirm that the relevant provisions of the Charter are sufficient to address the full range of threats to international peace and security. We further reaffirm the authority of the Security Council to mandate coercive action to maintain and restore international peace and security. We stress the importance of acting in accordance with the purposes and principles of the Charter.¹¹

The International Court of Justice (ICJ) in six separate cases has made clear that “self-defense” is a term of art in international law. The reference in Article 51 to self-defense is to the right of the victim state to use significant offensive military force on the territory of a state legally responsible for the attack. In six separate cases, the court has said that the attack must be attributable to the state for self-defense on the territory of that state to be lawful. The ICJ leaves open the possibility that a non-state actor group able to launch massive attacks from a state’s territory could be the object of force in self-defense. That scenario indicates the non-state actor group is the *de facto* government of that territory—as the Kurds are in Northern Iraq and the Taliban were in Afghanistan in 2001.

¹⁰ U.N. Charter art. 51: Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

¹¹ 2005 World Summit Outcome, UN GAOR, 60th Sess., at 22-23, U.N. Doc. A/60/L.1 (Sept. 15, 2005).

The ICJ has also ruled that the armed attack that gives rise to the right of self-defense must be an attack that involves significant amount of force—it must be more than a mere frontier incident, such as sporadic rocket fire across a border. It must also be more than the sort of attacks associated with terrorism, such as placing weaponized ink cartridges on cargo planes. Such an action is a crime but would not trigger the right to resort to military force in Article 51 self-defense.

States using force in lawful self-defense must be able to show that force is necessary to achieve a defensive purpose. If a state can make the necessity showing, it must also show that the method of force used will not result in disproportionate loss of life and destruction compared to the value of the military defensive. Necessity and proportionality are not expressly mentioned in the Charter, but the ICJ made clear in the *Nuclear Weapons* that the use of armed force must comply with the principles of necessity and proportionality.

Some argue that military force may be deployed when an attack is “imminent”. This is an extrapolation from the history of the necessity principle, subject of famous correspondence in 1842 between the U.S. and Britain over the British scuttling of a ship called the *Caroline*. The U.S. argued and Britain agreed that force in self-defense may only be used in situations of necessity, where the need to use force is “instant” and “overwhelming.” The correspondence does not feature the word “imminent”. It is unclear why the Department of Justice has asserted that an “imminent” threat can trigger the right of self-defense. Moreover, the correspondence occurred more than 100 years prior to the adoption of the UN Charter. The so-called *Caroline Doctrine* is still

important to understand the principle of necessity, but this principle exists in addition to Article 51, not instead of it.

The principle of proportionality, also mentioned in the Caroline correspondence, requires that a state acting in self-defense, not only restrict itself to that military force necessary to respond to the triggering attack, but also use only that force limited to accomplishing the defensive objective. Proportionality involves weighing the cost of resort to military force in terms of lives lost and property destroyed relative to the value of the legitimate military end. Assessing proportionality as a distinctive requirement of lawful resort to force only makes sense when the other conditions on lawful resort to force are also met. Meeting the requirements of both necessity and proportionality require evidence that an actual, significant armed attack is occurring. Lesser threats require resort to the Security Council, countermeasures such as economic sanctions, or cooperation with local police.

In summary, Article 51 was not designed for and makes little sense with respect to the targeting with missiles of individual criminal suspects on the territory of a state allied with the United States.

Consent

To use military force to kill persons and destroy property on the territory of another state with the consent of that state is also strictly limited under international law. First, the consent must be from the top elected leader of the country. Second, if it involves military force, the consent must be in the form of an invitation to participate in the government's own military operations on its territory. It is consent to join in counter-

insurgency as is occurring in Afghanistan today. Any use of military force for other purposes would violate the human rights of the citizens of that territory.

II. Origins of the Errors in Legal Advice

Two factors seem to explain how so much poor legal analysis has emerged regarding targeted killing as is found, for example, in the Department of Justice White Paper on the targeted killing of Americans beyond armed conflict zones.¹² First, the United States no longer possess the expertise on international law that it once had among its top government officials, judges and academics. The University of Chicago School of Law where President Obama taught for many years, to take just one example, has no professor with outstanding credentials in public international law, let alone expertise in the international law regulating the use of force. The Office of Legal Council in the Department of Justice has had lawyers working there who are openly hostile to international law. These individuals are typically uninformed of its requirements.

Even if there were more expertise in the United States, it has long been a problem that government lawyers attempt to provide justifications for what their bosses wish to do, as opposed to providing advice as to what the law really says. Evidence of this problem may be found in two publications: Richard Bilder and Detlev Vagts, *Speaking Law to Power: Lawyers and Torture*, 98 AM. J. INT'L L. 689 (2004) and *The Role of the Legal Adviser of the State Department*, 85 AM. J. INT'L L. (1991)(A Report of a Joint Task Force of the American Branch of the International Law Association and the American Society of International Law, chaired by Columbia's Professor Oscar Schachter.)

¹² http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf

Statement of The Constitution Project

Submitted to the Senate Judiciary Committee Subcommittee on the Constitution, Civil Rights and Human Rights in Connection with the April 23, 2013 Hearing Titled “Drone Wars: The Constitutional and Counterterrorism Implications of Targeted Killing”

April 22, 2013

The Constitution Project (TCP) submits this statement to urge Congress to continue to press the Obama administration for more transparency around U.S. targeted killing policies and practices. Targeted killing presents fundamental legal, ethical, and constitutional questions that concern us all. Our constitutional system of checks and balances requires that such policies and practices be subject to careful oversight by Congress and consideration and debate by an informed public. Neither is possible when the rules and standards by which the executive branch operates remain secret.

The Constitution Project is a nonpartisan organization that promotes and defends constitutional safeguards. TCP brings together legal and policy experts from across the political spectrum to promote consensus solutions to pressing constitutional issues.

On February 23, 2013, TCP’s Liberty and Security Committee issued a statement titled *Lift the Veil of Secrecy on Targeted Killing*.¹ The Liberty and Security Committee, formed in the aftermath of the terrorist attacks of 9/11, works to ensure that our government protects both our national security and our civil liberties. Signed by 24 policy and legal experts, former government officials, former military and intelligence personnel, and prominent academics, *Lift the Veil of Secrecy* calls on the President to:

- Release to the public the actual [Office of Legal Counsel (OLC)] opinions regarding the scope of the President’s targeted killing authority, and any other operative rules and legal guidance for the targeted killing program. To the extent that any of those documents contains properly classified information, such as the facts of a particular case or intelligence sources and methods, that information should be redacted, but should not prevent release of the documents themselves.
- Provide comprehensive information to all congressional committees of jurisdiction. Although properly classified information cannot be made public, it should still be shared fully with those committees and their cleared staff. The executive branch does not have the

¹ Hereinafter *Lift the Veil of Secrecy*. The full statement is attached as an Appendix.

authority to tell Members of Congress not to share information with their staff, and Members of Congress should insist that the executive branch share such information.²

We understand that members of the Judiciary Committee have been provided with *some* of the OLC opinions that analyze lethal targeting operations, in particular those that relate to American citizen targets.³ That is a step in the right direction and we appreciate Committee members' efforts to pry loose those documents. But Congress deserves, and should demand, more. At a minimum, the administration should turn over *all* memoranda that reflect its operative interpretations of law and rules concerning the lethal targeting of *any* person, as well as the legal criteria for identifying targets.⁴

That same information should also be disclosed to the American public, with redactions only where necessary to protect properly classified information. "In a democracy that rests on the rule of law, a policy of targeted killing demands *public* authority, *public* debate, and *public* accountability."⁵

Open government should not be a partisan issue. TCP's Liberty and Security Committee is co-chaired by David Cole, a Georgetown law professor and the legal affairs correspondent for the Nation, and David Keene, former chairman of the American Conservative Union. In a March 14, 2013 *Los Angeles Times* op-ed, they wrote:

There may not be much that can unite conservatives and liberals these days, but a commitment to transparent government should be something we can all agree on. ... There is simply no legitimate reason to withhold from the American people the legal rules and standards under which our government operates, particularly when asserting the power to take human life.⁶

Not only does the call to shed light on targeted killing policies and practices cross party lines, it also finds support among former intelligence officials. According to two such officials who are also Liberty and Security Committee members who joined in *Lift the Veil of Secrecy*:

We have a significant stake in open government, both as former intelligence officials and as public citizens. We understand from experience the government's need to keep certain information secret. Intelligence officers whose work is critical to our national security couldn't do their jobs if properly classified information, such as intelligence sources and methods and sensitive operational details, were open to the public. Yet we

² *Id.*

³ We understand this to be the same information provided previously to the Senate Select Committee on Intelligence, and most recently to the House Judiciary Committee.

⁴ This includes the operative law, rules and criteria for the reported practice of so-called "signature" strikes.

⁵ David Cole, *It's Time to Stop Killing in Secret*, New York Review of Books Blog, November 28, 2012, <http://www.nybooks.com/blogs/nyrblog/2012/nov/28/its-time-stop-killing-secret/>.

⁶ David Cole and David Keene, *Secrets No President Should Keep*, Los Angeles Times, March 14, 2013, <http://articles.latimes.com/2013/mar/14/opinion/la-oe-0314-cole-transparency-drone-obama-20130314>.

also believe that when the cloak of secrecy extends too far – as it has with the targeted killing program and the previous “enhanced interrogation” program – both our democracy and our security suffer.

...

When the rules are clear, officials carrying out national security policies can do so with confidence that they are acting within the bounds of the law. The government can build the public support necessary to sustain such programs over time.⁷

Excessive government secrecy has been recognized as a threat to the very roots of our democracy and the legitimacy of those who govern. There is no way to know if the President is executing the laws faithfully, as the Constitution requires, if the operative rules and procedures he is following remain hidden behind closed doors. The executive branch has a constitutional obligation to disclose the information Congress needs to fulfill its oversight function and the American public needs to effectively evaluate the actions of its political leaders. Should the President continue to refuse to fulfill that obligation in the targeted killing context, we urge Congress to use the powers at its disposal to compel increased transparency.

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⁷ Mary McCarthy and Paul Pillar, *Shedding Light on Targeted Killing Program*, the Washington Times, March 15, 2013, <http://www.washingtontimes.com/news/2013/mar/15/mccarthy-and-pillar-shedding-light-targeted-killin/>.

THE CONSTITUTION PROJECT



Safeguarding Liberty, Justice & the Rule of Law

**LIFT THE VEIL OF SECRECY
ON TARGETED KILLING**

**THE CONSTITUTION PROJECT'S
LIBERTY AND SECURITY COMMITTEE**

February 25, 2013

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LIFT THE VEIL OF SECRECY ON TARGETED KILLING

According to a recent report from the Council on Foreign Relations, the United States has used unmanned drones to conduct over 400 lethal strikes against certain terrorism suspects in the context of the conflict against al Qaeda and its associated forces.¹ At least one American citizen has been targeted, and at least three American citizens² are among the estimated several thousand people who have been killed.³

High-level government officials have spoken in general terms about the executive branch's "targeted killing" program, and the program has been the subject of much popular speculation and (partially informed) debate. Yet most of the legal analysis upon which the executive branch relies to justify targeted killing, as well as the rules that have been developed to govern the program's operation, remain cloaked in secrecy. That is unacceptable. "In a democracy that rests on the rule of law, a policy of targeted killing demands *public* authority, *public* debate, and *public* accountability."⁴

Over the past several years the Obama administration has developed operative rules and procedures to guide targeted killings, but has done so behind closed doors.⁵ Both Congress and the American people have repeatedly – and rightly – called for more transparency into the program to little avail. Members of the Senate Select Committee on Intelligence (SSCI) have long sought the actual legal opinions that analyze the scope of the president's targeted killing authority – particularly with respect to American citizens.⁶ According to reports, the president has only provided the committee with four of the opinions drafted by lawyers from the Office of Legal Counsel (OLC). Even then, the president limited the Committee's access by refusing to permit SSCI Members to retain copies of these documents or to share them with committee staff.

¹ Micah Zenko, *Reforming U.S. Drone Strike Policy*, Council Special Report No. 65, Council on Foreign Relations Center for Preventive Action, at 8 (January 2013), i.cfr.org/content/publications/attachments/Drones_CSR65.pdf.

² *New York Times Co. v. U.S. Dep't of Justice*, 2013 U.S. Dist. LEXIS 979, at *5-6 (S.D.N.Y. January 3, 2013) (corrected opinion granting the government's motion for summary judgment and denying plaintiffs' cross motion for summary judgment).

³ INTERNATIONAL HUMAN RIGHTS AND CONFLICT RESOLUTION CLINIC AT STANFORD LAW SCHOOL AND GLOBAL JUSTICE CLINIC AT NYU SCHOOL OF LAW, *LIVING UNDER DRONES: DEATH, INJURY, AND TRAUMA TO CIVILIANS FROM US DRONE PRACTICES IN PAKISTAN* (2012) ("LIVING UNDER DRONES") at 43-54 (analyzing sources of aggregate drone strike data), <http://livingunderdrones.org/report/>. The authors found most reliable the data published by *The Bureau of Investigative Journalism* (TBIJ), a U.K. based journalism non-profit. As of February 22, 2013, TBIJ estimated that between 2966 and 4855 people have been killed by drone strikes in Pakistan, Yemen and Somalia combined, <http://www.thebureauinvestigates.com/category/projects/drone-data/>. Other organizations' estimates are lower, but do not appear to include the same range of data. See *LIVING UNDER DRONES* at 43-54.

⁴ David Cole, *It's Time to Stop Killing in Secret*, New York Review of Books Blog, November 28, 2012, <http://www.nybooks.com/blogs/nyrblog/2012/nov/28/its-time-stop-killing-secret/>.

⁵ Greg Miller, Ellen Nakashima & Karen DeYoung, *CIA drone strikes will get pass in counterterrorism 'playbook,' officials say*, Washington Post, January 19, 2013, http://articles.washingtonpost.com/2013-01-19/world/36474007_1_drone-strikes-cia-director-playbook.

⁶ Feinstein Statement on Intelligence Committee Oversight of Targeted Killings (February 13, 2013), <http://www.feinstein.senate.gov/public/index.cfm/2013/2/feinstein-statement-on-intelligence-committee-oversight-of-targeted-killings>; January 14, 2013 Letter from Senator Ron Wyden to John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, <http://www.wyden.senate.gov/download/letter-to-brennan>; February 4, 2013 Letter from Ten U.S. Senators to President Barack Obama, <http://www.wyden.senate.gov/download/letter-to-president-obama-seeking-legal-opinions>.

For the president to withhold information from Congress regarding a program that Congress must fund, or to direct how Congress may use information to which it is entitled, violates constitutional principles of checks and balances. Similarly, the Department of Justice (DOJ) continues to fight tooth and nail in litigation under the Freedom of Information Act that seeks the public release of those opinions and other targeted killing records, refusing even to acknowledge the program's existence.⁷

On February 4, 2013, NBC News made public a DOJ white paper entitled "Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa'ida or An Associated Force."⁸ The white paper adds some details to the limited disclosures made in previous public speeches by former State Department Legal Advisor Harold Koh,⁹ Attorney General Eric Holder,¹⁰ and CIA director-nominee (then-counterterrorism advisor to the president) John O. Brennan¹¹ that broadly outlined the targeted killing program. However, the leaked white paper is no substitute for the operative legal and policy analyses.¹² Indeed, the white paper is woefully inadequate to answer fundamental legal, ethical, and constitutional questions about when, if ever, it can be lawful for the government to engage in targeted killing. What level of proof is necessary to place somebody on the "kill list?" What procedural protections are in place to minimize the risk of false positives? Is anyone charged with making the case for keeping a putative target *off* the list? When, if ever, does the president have the authority to order that an individual, who is not presently engaged in an attack against the United States, may be killed rather than captured? How do government officials determine that the threat an individual poses is sufficiently "imminent" to justify a decision to target rather than seek to capture? Does the president claim the power to engage in targeted killing on U.S. soil? Does the president ever have the right to kill American citizens without acknowledging that he has done so? Or, does due process forbid the secret killing of one's own citizens?

President Obama entered office promising an unprecedented level of openness in government. In a January 2009 memorandum to executive branch departments and agencies, he explained that government should be both *transparent*, because "[t]ransparency promotes accountability and provides information for citizens about what their Government is doing," and *participatory*, because "[p]ublic engagement enhances the Government's effectiveness and improves the quality

⁷ *ACLU v. CIA*, No. 11-5320 (D.C. Cir.) DE 1420243 (Letter dated February 13, 2013 from DOJ to the Court disputing that the CIA has officially acknowledged interest or involvement in the use of drones for targeted killing), http://www.aclu.org/files/assets/cia_response_to_letter.pdf.

⁸ *Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who is a Senior Operational Leader of Al-Qaida or an Associated Force*, http://www.lawfareblog.com/wp-content/uploads/2013/02/020413_DOJ_White_Paper.pdf.

⁹ Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, Keynote Address at the Annual Meeting of the American Society of International Law: *The Obama Administration and International Law* (March 25, 2010), <http://www.state.gov/s/l/releases/remarks/139119.htm>.

¹⁰ Eric Holder, Attorney General, Remarks at Northwestern University Law School (March 5, 2012), <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>.

¹¹ John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, Prepared Remarks at the Woodrow Wilson International Center for Scholars: *The Ethics and Efficacy of the President's Counterterrorism Strategy* (April 30, 2012), <http://www.lawfareblog.com/wp-content/uploads/2012/04/WilsonCenterFinalPrepared1.pdf>.

¹² According to Senator Diane Feinstein, the DOJ White Paper was provided to the Senate Intelligence and Judiciary Committees in June 2012 as a confidential document. See Memorandum from Dianne Feinstein, Senator (February 5, 2013), <http://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=f02275d9-7638-4613-b90b-3aa8c624eaf8>.

of its decisions.”¹³ On April 16, 2009, President Obama, citing again his commitment to transparency and accountability, released the previously secret DOJ memorandums underlying the prior administration’s approach to counterterrorism interrogations because “withholding these memos would only serve to deny facts that have been in the public domain for some time. This could contribute to an inaccurate accounting of the past, and fuel erroneous and inflammatory assumptions about actions taken by the United States.”¹⁴ More recently, the president pledged to better inform the American people of the “constraints” and “legal parameters” of counterterrorism efforts.¹⁵ For the very reasons he has stated repeatedly since taking office, the president must now make good on those assurances. Specifically with respect to the targeted killing program, we urge the president to:

1. Release to the public the actual OLC opinions regarding the scope of the president’s targeted killing authority, and any other operative rules and legal guidance for the targeted killing program. To the extent that any of those documents contains properly classified information, such as the facts of a particular case or intelligence sources and methods, that information should be redacted, but should not prevent release of the documents themselves.
2. Provide comprehensive information to all congressional committees of jurisdiction. Although properly classified information cannot be made public, it should still be shared fully with those committees and their cleared staff. The executive branch does not have the authority to tell Members of Congress not to share information with their staff, and Members of Congress should insist that the executive branch share such information.

The lack of transparency around the targeted killing program is emblematic of a deeply troubling and increasingly pervasive larger problem that has plagued a succession of administrations: “secret law.” The legal rules and standards under which our government operates should not be secret. While counterterrorism tactics and military strategy may be appropriately withheld from public disclosure, the public has a right to know the legal framework within which these and other operations are conducted, including the safeguards in place to protect constitutional and legal rights. While the president must be able to obtain frank and confidential legal advice about how the law may apply in particular circumstances, the governing rules themselves can never be secret. Our Liberty and Security Committee addressed this issue in the fall of 2012 with regard to opinions of the Foreign Intelligence Surveillance Court (FISC). In our *Report on the FISA Amendments Act of 2008* we stated that “significant decisions by the FISC should be released even if in redacted form or, at a minimum, summarized in an unclassified report. Although the specific facts showing the justification for surveillance in particular cases may remain classified,

¹³ Memorandum from Barack Obama, President of the United States, to the Heads of Executive Departments and Agencies, <http://www.whitehouse.gov/the-press-office/transparency-and-open-government>.

¹⁴ Statement of Barack Obama, President of the United States, on Release of OLC Memos (April 16, 2009), http://www.whitehouse.gov/the_press_office/Statement-of-President-Barack-Obama-on-Release-of-OLC-Memos.

¹⁵ Jim Kuhnenn, *Obama Tackles Drones, Pennies, Guns in Google Chat*, ABC News, Feb. 15, 2013, <http://abcnews.go.com/Politics/wireStory/obama-takes-range-questions-google-chat-18506277>; see also Remarks by the President in the State of the Union Address, February 12, 2013 (“So in the months ahead, I will continue to engage Congress to ensure not only that our targeting, detention and prosecution of terrorists remains consistent with our laws and system of checks and balances, but that our efforts are even more transparent to the American people and to the world.”) (emphasis added), <http://www.whitehouse.gov/the-press-office/2013/02/12/remarks-president-state-union-address>.

the standards and analysis being applied by the FISC should be made public.”¹⁶ This same analysis applies to OLC opinions and any other documents that set forth the legal standards under which the executive branch operates.

Our constitutional system of checks and balances demands robust oversight by Congress and consideration and debate by an informed public. Neither is possible when the rules are hidden from Congress and from public view. Sensitive operational and intelligence details may of course remain appropriately classified. But the regime of law and applicable rules that govern national security programs must be made public. Our government’s commitment to transparency must not evaporate the moment that national security concerns are invoked.

¹⁶ The Constitution Project, Liberty and Security Committee, Report on the FISA Amendments Act of 2008 (September 6, 2012) at 12, http://constitutionproject.org/pdf/fisaamendmentsactreport_9612.pdf.

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**United States Senate Judiciary Committee
Subcommittee on the Constitution, Civil Rights and Human Rights**

**Drone Wars: The Constitutional and Counterterrorism Implications of
Targeted Killing**

Written Testimony of Ibrahim Mothana

April 23, 2013

Chairman Durbin, Ranking Member Cruz, and members of the Subcommittee, thank you for the opportunity to provide my written testimony on the critical issue of increasing US targeted killings in Yemen.

My name is Ibrahim Mothana and I am a youth activist from Yemen. I am a co-founder of Watan, a new Yemeni political party, and a member of the advisory board of the Arab Thought Foundation, an independent, non-governmental organization dedicated to advancing the economic, social and cultural development of the Arab region. I started writing at the age of 12 and my commentary has been featured in numerous publications including The New York Times, CNN and Aljazeera English.

Yemen and the United States of America

Mr. Chairman and members of the committee, I would like to tell you about my country. The people of our two countries share many of the same dreams although many Americans may not realize this, in part because of a media that focuses on terrorism to the exclusion of a broader understanding of Yemen. Al-Qaeda and its associates in Yemen, at the most extreme estimates, number a few thousand members, no more than a fragment of our 24 million people who hope and dream of a better future—one that offers them dignity, freedom, and economic stability. We are the poorest country in the Middle East with over 50 percent of our people living on less than 2 dollars a day. We are running out of water and out of oil, our major source of foreign revenue. Our nation has been troubled by decades of conflicts and an irresponsible, corrupt government. A lot of my childhood friends are unemployed

and live a daily struggle to maintain their basic human needs. In 2011, millions of Yemenis who lived decades under one autocratic ruler rose up in a largely peaceful revolution calling for democracy, accountability and justice, the very values cherished in American democracy.

Many young people like me grew up looking to America and its people for inspiration. Among many other things my teenage years were enriched by Carl Sagan's Cosmos, Martin Luther King Junior's speeches, Mark Twain's sarcasm and American TV shows. The promise of equality and freedom seemed fulfilled when America elected its first black president. With an upsurge of happiness, many Yemenis celebrated the inauguration day and, at that point, President Obama was more popular among my friends than any other Yemeni figure. I was inspired by President Obama's promise of "a new era of leadership that will bring back America's credibility on human rights issues and reject prioritizing safety to ideals." But happiness and inspiration gave way to misery. My admiration for the American dream and Obama's promises has become overshadowed by the reality of the American drones strike nightmare in Yemen.

The Impact on Yemen and its People of the US Targeted Killing Policy

In the past few years, I have visited and worked in areas of Yemen that are the forefront of what the United States views as a global conflict against Al-Qaeda and associated forces. I have witnessed how the US use of armed drones and botched air strikes against alleged militant targets has increased anti-American sentiment in my country, prompting some Yemenis to join violent militant groups, motivated more by a desire for revenge than by ideological beliefs.

We Yemenis got our first experience with targeted killings under the Obama administration on December 17, 2009, with a cruise missile strike in al-Majala, a hamlet in a remote area of southern Yemen. This attack killed 44 people including 21 women and 14 children, according to Yemeni and international rights groups including Amnesty International. The lethal impact of that strike on innocents lasted long after it took place. On August 9, 2010, two locals were killed and 15 were injured from an explosion of one remaining cluster bomb from that strike.

After that tragic event in 2009, both Yemeni and US officials continued a policy of denial that ultimately damaged the credibility and legitimacy of the Yemeni

government. According to a leaked US diplomatic cable, in a meeting on January 2, 2010, Deputy Prime Minister Rashad al-Alimi joked about how he had just "lied" by telling the Yemeni parliament the bombs in the al-Majala attack were dropped by the Yemenis, and then-President Ali Abdullah Saleh made a promise to General Petraeus, then the then head of US central command, saying: "We'll continue saying the bombs are ours, not yours." Such collusion added insult to injury to Yemenis.

Animosity has been heightened by the US use of so-called "signature strikes" that target military-age males and groups by secret, remote analysis of lifestyle patterns. In Yemen, we fear that the signature strike approach allows the Obama administration to falsely claim that civilian casualties are non-existent. In the eye of a signature strike, it could be that someone innocent like me is seen as a militant until proven otherwise. How can a dead person prove his innocence? For the many labeled as militants when they are killed, it's difficult to verify if they really were active members of groups like AQAP, let alone whether they deserved to die.

In Yemen, we know that the reliability of the intelligence the United States uses to launch and report drone strikes is questionable. For instance, the Yemeni authorities have claimed three times that Saeed al-Shiri, the second-in-command of Yemen-based Al Qaeda in the Arabian Peninsula (AQAP), was killed by a drone strike. According to Yemeni and international media, at least 30 other suspected militants were announced to be killed in these strikes. But as recently as April 8, 2013, Shihri appeared to be alive. So who were the dozens of people killed in the three strikes that allegedly killed Shihri?

In the majority of cases, we Yemenis receive no explanation about why suspected militants are killed and what threat they posed to the United States. If the intelligence misidentified Shihri, the suspected militants who were killed in these incidents might just be random people who were in the wrong place.

We Yemenis are deeply worried that the Obama administration appears to be avoiding the Guantanamo dilemma of indefinite detentions without charge by killing suspects in Yemen rather than trying to capture them. An example is the November 7, 2012 targeted killing of Adnan al-Qadhi, who was a lieutenant colonel in the Yemeni army and reported to be a suspected al-Qaeda militant in Sanhan, a district 22 miles east from the Yemeni capital and a 15-minute drive from where I live. Sanhan is near to one of the biggest bases of the Republican Guard, at the time one

of Yemen's most powerful military units. According to his family members, Yemeni authorities could have arrested Adnan any time. Adnan's brother Hemyar al-Qadhi told me, "Adnan was arrested and released by the government in 2008 and we would've taken him ourselves to the authorities if they requested him again."

We Yemenis ask ourselves, how many more of our citizens were killed without any attempt at capture instead? Why is it that in the four years that John Brennan was the top counterterrorism advisor, only one so-called "high-value target" was arrested anywhere outside the United States?

More Human Costs and the Consequences of US Targeted Killing Policy

During my visits to Abyan, Shabwa and Radaa, three areas of central and southern Yemen where the US has carried out targeted killings, I was overwhelmed with sadness meeting families of drone victims suffering a miserable combination of personal loss and devastating economic burden. Many of the children of strike victims that I saw were severely malnourished and families who lost their main financial provider had little hope for the future. For many of the youngsters, death seemed an easier burden than life so, with this bleak outlook, they joined the fight against the government.

With drones flying overhead 24/7, people are living in constant fear and anxiety over the possibility of another strike. During my visits to these areas, I shared their fear. I felt as Adel al-Jonaidi, a high school student living in Radaa did, when he told me, "Whenever drones are hovering in the area, it's like being in a state of waiting endlessly for execution."

The more unjustified the drone strike victim, the more rage it creates within local communities. Angry reaction followed in Hadramout when Salem Ahmed Bin Ali Jaber, a moderate cleric who often denounced violence and publicly opposed al-Qaeda, was killed in a drone strike on August 25, 2012. Such strikes call into question US claims of tidy surgical strikes and explain why the number of AQAP estimated fighters increased from a few hundred in 2009 to a few thousand in 2013, according to Yemeni and US government estimates.

In another botched strike, a missile struck a passenger van in central al-Bayda governorate on September 2, 2012, killing 12 civilians, 3 of them children. Local

and international media initially quoted anonymous Yemeni officials as saying the strike targeted militants, but state-run media later conceded the killings were an “accident” that killed civilians. During a recent visit to Radaa, the city near the attack site, I met Mohamed Mabkhoot, a relative of one of the civilians who was killed. Mabkhoot explained how months after the attack there is still mounting rage at the apathy and inability of the Yemeni government to bring justice for those affected by the strike.

“Our lives are not worthless and it’s common sense that people start hating America when their innocent relatives and family members are killed. Young people here are desperate and will fight to die if they don’t have anything left for them to live for,” he told me.

Drone strikes and US military intervention are the rallying cry that al-Qaeda and its affiliates in Yemen use to recruit more fighters. In a country like Iraq, al-Qaeda was created from scratch after 2003, seizing on the existing local grievances the war created. Something similar is happening here in Yemen. During my visits to different parts of my country, even though I hear broad opposition to AQAP, I also hear objections to foreign intervention by the United States.

Even natural allies of the United States like young leaders, intelligentsia and the upper middle class feel that the targeted killings infringe on Yemen’s sovereignty. Many of us ruefully repeat a line from one President Obama’s press conference on November 18, 2012: “There is no country on Earth that would tolerate missiles raining down on its citizens from outside its borders.”

Moreover, it’s vital to grasp the intricacies of our society’s reality, where tribal dynamics and laws are vital in largely under-governed areas. In Yemen, killing a person without trial is not only extrajudicial, it also violates the sovereignty and dignity of the entire tribe to which the slain person belonged. Each tribe is responsible for defending and ensuring the safety of its members. Understanding the tribal system and traditions is key to winning hearts and minds of the local populations and to gaining their support. The lack of any apology, compensation or damage control-mechanisms, outrages tribes and local populations in the affected area.

In one case, a drone strike exacerbated my country's already serious political and economic difficulties. On May 25, 2010, a US drone strike killed Jabr al-Shabwani, a prominent sheikh and deputy governor of Marib province who was a US counterterrorism ally. After Sheikh Shabwani was killed by the strike, his tribe carried out retaliatory attacks on my country's main oil pipeline, which runs through Marib, costing Yemen billions of dollars. This is no small matter when you consider that 70 percent of Yemen's national budget relies on oil exports. The strike also erased years of progress and trust-building between the US and other tribes who had helped fight Al Qaeda in their areas; they considered the killing a betrayal.

The Targeted Killing Policy is Counter-Productive

Many of us in Yemen believe that even strikes that kill AQAP leaders can be counterproductive. The short-term military gains are miniscule compared to the long-term damage that the targeted killing program causes. In the place of one slain leader, new leaders swiftly emerge in furious retaliation for attacks in their territories. And with each strike, it becomes ever easier to belong to a militant group in the region where your tribe lives.

As Khaled Toayman, a young Sheikh from Marib and a son of a Yemeni member of parliament told me, "We are against terrorism and we seek to live in peace and dignity like anyone else in the world. I don't hate America or Americans. I just want to know why my relatives are killed."

In my visits to the areas affected by drone strikes, I observed an increasing sentiment that America is part of a problem and not a solution, something that is hard for diplomats to feel while living disconnected from Yemenis in the emerging Green Zones of Sanaa. In Yemen, it's impossible to win a war with drone strikes where basic services and human needs remain unmet. For a loaf of bread, you can push a hungry, desperate and angry young man to fight for al-Qaeda, possibly regardless of his ideological beliefs.

Conclusion

Mr. Chairman and members of the committee, we Yemenis are the ones who suffer the most from the presence of Al Qaeda and getting rid of this exhausting plague is a top priority for the majority of people in the country. But we also see that there is

no easy way to end terrorism. Only a long-term approach that strengthens democracy, accountability and justice, together with programs to address structural economic and social drivers of extremism can bring about security in my country.

When I think of solutions, I think of our common ideals. The drone program is far from these. Edward S. Herman offers us a critique and an opportunity in his reflection on Hana's Arendt concept of the Banality of Evil: "Doing terrible things in an organized and systematic way rests on 'normalization.' This is the process whereby ugly, degrading, murderous, and unspeakable acts become routine and are accepted as 'the way things are done.' "

As a Yemeni citizen, I urge the US government not normalize crimes committed under the name of your great country. I call on the US administration to be transparent regarding the strikes it has authorized in Yemen and to compensate affected civilians. I call on the United States to critically reflect on using targeted strikes and the existing counterterrorism policy in Yemen and to see that, it is insecurity and not security that these are creating in my country, the region, the US, and the entire world.



Center for National Security Studies
protecting civil liberties and human rights

Director
 Kate Martin

Memorandum to Interested Persons

Re: Legal issues re the use of military force against al Qaeda, the Taliban and associated forces.
 Date: March 20, 2013

Introduction: There is much recent discussion about the use of “targeted killings” and drone strikes as well as continuing debate concerning military detention without charge and the possibility of expanding U.S. military operations to new areas, such as Northern Africa. In order to facilitate a common understanding of the areas of agreement and disagreement about these issues, this memorandum attempts to explain the legal rationales for, as well as some of the controversies surrounding, the use of military force by the United States government, including the CIA, against al Qaeda, the Taliban and “associated forces.” This memorandum is only an outline, not a full discussion of the law, but we hope it provides a useful bridge between academic analyses, official government explanations, and more general public discussions. The memorandum tries to distinguish between questions of law and those of policy, and concentrates on the former.

Our starting point, of course, is the current war with al Qaeda and the Taliban. United States and other military forces unquestionably continue to be engaged in hostilities with al Qaeda and the Taliban in Afghanistan and in the FATA areas of Pakistan, and reportedly with Al Qaeda in the Arabian Peninsula (AQAP) in Yemen as well. The significance of current U.S. military engagement in hostilities in these particular areas of the world has sometimes been obscured by the simplistic rhetoric of those who claim that the United States is currently involved in a “world-wide war,” as well as by those who wish to deny the existence of any war because they believe that the threat from al Qaeda should be countered with law enforcement rather than military means. The explanations offered by the government similarly fail to clearly articulate its view concerning the limits of where military force may be used, even though it appears that this administration is employing military force in only a discrete and limited number of places.

Since 9/11, the U.S. government has used both law enforcement tools and military force (along with intelligence) against al Qaeda and its allies, and there is continuing controversy about when and where it is legal or wise to use one or the other. The discussion surrounding this controversy has sometimes obscured rather than illuminated the actual issues by failing to acknowledge and distinguish between the very different rules governing a state’s use of military force under the laws of armed conflict (LOAC), and rules governing the use of lethal force in law enforcement operations. The use of lethal force for law enforcement is much more circumscribed— than the use of military force in an armed conflict. The essential feature of war is that there is immunity for intentionally killing enemy forces. Similarly, there has been much confusion between two quite separate doctrines of self-defense: that relied upon by states under United Nations Charter Article 51 to respond to “armed attacks” and that which allows law enforcement agents to use lethal force in response to an immediate threat of death or substantial

injury. (While both concepts include reference to “imminence”, it is important to recognize that the concepts are quite different.¹) This memorandum addresses only the rules for the use of military force, not those for counterterrorism law enforcement operations.

Just as it is crucial to distinguish between the rules for law enforcement and the law of armed conflict; it is essential to distinguish between the state of being at war and being at peace. As the former General Counsel of the Defense Department explained:

“War” must be regarded as a finite, extraordinary and unnatural state of affairs. War permits one man – if he is a “privileged belligerent,” consistent with the laws of war — to kill another. War violates the natural order of things, in which children bury their parents; in war parents bury their children. In its 12th year, we must not accept the current conflict, and all that it entails, as the “new normal.” Peace must be regarded as the norm toward which the human race continually strives. ...[L]eading scholars committed to the study of war ... have observed that analyzing war in terms of a continuum of armed conflict — where military force is used at various points without a distinct break between war and peace — is counterproductive. Such an approach, they argue, results in an erosion of “any demarcation between war and peace,” the very effect of which is to create uncertainty about how to define war itself (citation omitted).²

This memorandum begins with current U.S. operations and the questions and objections they have generated to help illuminate the choices faced by the United States going forward. The discussion by and large draws from the U.S. government’s public statements concerning the legal bases for its actions and notes some of the most controversial aspects of those statements.³ It concludes by identifying some major issues for congressional and public debate.

Factual Background: This discussion is taken from both official U.S. government sources and reports based on unofficial statements and other information. Clear acknowledgment by the government of where U.S. forces, including CIA personnel, are engaged in combat is needed for a full understanding and debate of such involvement.

Afghanistan and Pakistan: The U.S. is currently involved in active hostilities in Afghanistan and across the border in Pakistan. These hostilities involve the use of U.S. and other ground forces, as well as conventional airpower and U.S. drones. They also involve enemy attacks launched from the Pakistan side of the border into Afghanistan. The generally accepted (and correct in our view) understanding is that there is an ongoing “armed conflict” in these areas, although not an “international armed conflict” between states, e.g., between the United States and Afghanistan. The facts on the ground easily meet the widely understood definition of armed conflict and there is no doubt that U.S. military forces are engaged in that conflict. (In this memorandum, the term U.S. military forces is used to include both regular DoD forces, special operations forces and civilian agencies such as the CIA when they engage in uses of lethal force, except where otherwise stated.) The Rules of Engagement for U.S. military forces in Afghanistan and Pakistan are those which would only be legal during an armed conflict, in that they allow the deliberate killing of enemy fighters.ⁱⁱⁱ At the same time, it appears that the

¹ The predicate for the use of force under each doctrine is different, e.g., Article 51 refers to an “armed attack;” in addition the rules restricting the means and methods of force are also different, e.g. Article 51 uses of force in self-defense must comply with the LOAC, which is not the case for law enforcement uses.

governments of both Afghanistan and Pakistan may be reluctant to publicly acknowledge the existence of an armed conflict in their countries, which complicates the U.S. government's discussions of the issue.²

Yemen, Somalia and the Philippines. The first U.S. targeted missile strike in Yemen against al Qaeda members appears to have occurred in 2002. More recently, the U.S. has also used military force against al Qaeda in the Arabian Peninsula (AQAP) in Yemen and it appears that it is continuing to do so.^{iv} The government has not disclosed whether the use of such force includes ground forces as well as attacks by drone missiles, nor has it clearly stated whether those attacks are solely against AQAP. It has become clear that the U.S. has determined that AQAP has associated itself with al Qaeda and has launched armed attacks against the United States from Yemen, including the December 2009 would-be airplane bomber and subsequent plots. While the reported levels of violence in Yemen and the existence of AQAP seem likely to be sufficient to constitute an "armed conflict" in that country, the U.S. has not been clear about its view of the nature of armed conflict in that country, nor the identity of the parties to any such conflict. The Yemeni government has apparently consented to at least some U.S. uses of force, although it may also be reluctant to admit to the existence of an armed conflict in its country. It is much less clear whether the U.S. has used military force in Somalia and whether it is continuing to do so, although it has stated that it has taken "direct action" in Somalia against members of al Qaeda. There are references to U.S. actions in both Yemen and Somalia in the President's reports to Congress under the War Powers Act but the references are not clear about whether and when the U.S. has actually used military force there.^v

There were reports of a U.S. military operation in the Philippines in 2002, but none since then.

United States, Europe and other parts of the world. There is no doubt that the U.S. military is not engaged in hostilities in the United States, nor is there any indication that there are plans for it to do so. Similarly, the U.S. military is not engaged in hostilities in Europe or in the Middle East or elsewhere outside the countries listed above. (The situation in Mali and North Africa is addressed below.) The last administration did describe a U.S. "global war against terror" and issued legal opinions to the effect that the Geneva Conventions did not apply to the conflict.^{vi} It also carried out operations seizing individuals in countries in both Europe and Africa, which were justified as operations under the laws of war and which expressly did not seek to bring the seized individuals before civilian courts for trial. There have been no reliable reports of this practice continuing in the present administration in these parts of the world, despite pressure from Congress to do so. One individual, Ahmed Warsame, was seized on the high seas between Yemen and Somalia and brought to the United States to face criminal charges. The U.S. has also brought bin-Laden's son-in-law, who was detained in Jordan, to trial in the United States.

Mali and neighboring countries in North Africa. According to press accounts, the United States has not been actively engaged in combat in this part of the world either through ground

² It is also apparent that governments in the region may sometimes consent to the use of military force by the U.S. within their territories without being willing to publicly say so. Keeping such consent secret complicates the legal analysis where such consent may be relevant to the lawfulness of military action.

forces or drone strikes. According to the same accounts, however, the U.S. has supplied French forces with intelligence and other assistance in their military campaign. It has also secured agreements for the operation of some surveillance drones in the area. There are press reports that the administration is considering deploying U.S. military forces to engage in hostilities in that region. (Note that hostage rescue missions are conducted under separate legal authorities and are outside the scope of this memo.)

Legal Principles Applicable to the Use of Military Force:

The legal principles applicable to the use of military force address first the question of *jus ad bellum*, when may a state resort to the use of military force; and second *jus in bello*, the rules governing the means and methods that may be lawfully applied in using military force, in particular the requirements of necessity, distinction, proportionality, and humanity. The use of military force by the United States is subject to both constitutional and international law requirements, including requirements imposed by the UN Charter and the law of armed conflict, also called international humanitarian law.³ (The Constitution of course makes the generally accepted international law principles of *jus ad bellum* and *jus in bello* applicable to the U.S.)

Jus ad bellum, states' resort to military force: Constitutional and international law requirements prescribe the conditions to be met before the United States may resort to military force. The Constitution requires the use of force to be authorized by the Congress or come within the President's Article II Commander-in-Chief powers. There is general agreement that the President can act to repel a sudden attack or invasion without congressional authorization, but disagreement about whether he has any unilateral power without congressional authorization to commit U.S. forces to war in other situations. The War Powers Act was enacted as an effort to delineate Presidential and Congressional authority, but is generally seen as having failed to do so. International law delimits a state's use of force under Chapters VI and VII of the U.N. Charter requiring Security Council action while recognizing a state's inherent right to self-defense in Article 51 of Chapter VII.

There are three major bases for the United States' legal authority to wage war against al Qaeda. First, the 2001 congressional Authorization to Use Military Force (AUMF) gave the President the authority 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”

thereby satisfying the constitutional requirement of authorization for those uses of military force covered by this AUMF.

In 2001, U.N. Security Council resolutions also approved the use of military force in response to the September 11 attacks, against al Qaeda and the Taliban.^{vii}

³ The differences and applicability of international humanitarian law and international human rights law are for the most part not germane to the specific questions addressed in this memo.

The United States has also claimed the right to use military action in self-defense against attacks by al Qaeda or its associated forces.^{viii}

There is little doubt that these three bases constitute sufficient authority for the U.S. military operations in Afghanistan and the border areas of Pakistan. There seems little ground for dispute that the ongoing hostilities in Afghanistan have as a matter of fact spilled over the border with Pakistan at least into the FATA areas.

There is less clarity about the U.S. rationales for uses of force in Yemen or elsewhere, and more criticism of the various rationales.

It is unclear whether the Bush administration relied upon any authority for the 2002 strike in Yemen other than the President's Article II Commander-in-Chief war powers. While the Obama administration has not been perfectly clear, it appears to rely on at least two alternative bases for its use of force against AQAP in Yemen. First it claims that the use of force was authorized by Congress in the 2001 AUMF. It reads the AUMF as authorizing the use of force against "associated forces" of al Qaeda, treating such forces as co-belligerents under the LOAC. It appears to have determined that AQAP is an "associated force" with al Qaeda at least in part because AQAP has launched attacks against the U.S. from Yemen and announced its alliance with al Qaeda in its war against the United States. By the same reasoning, the Obama administration claims that its use of military force in Yemen is also legal under international law as part of the armed conflict with al Qaeda.

Because we are engaged in an armed conflict with al-Qa'ida, the United States takes the legal position that—in accordance with international law—we have the authority to take action against al-Qa'ida and its associated forces

Remarks of John O. Brennan, "Strengthening our Security by Adhering to our Values and Laws," (Harvard Law School, September 16, 2011).

Alternatively, the administration claims that its military attacks against AQAP are lawful acts of self-defense under international law. In the same speech, Mr. Brennan explained that

Others in the international community—including some of our closest allies and partners—take a different view of the geographic scope of the conflict, limiting it only to the "hot" battlefields. As such, they argue that, outside of these two active theatres [Afghanistan and Iraq], the United States can only act in self-defense against al-Qa'ida when they are planning, engaging in, or threatening an armed attack against U.S. interests if it amounts to an "imminent" threat."

He then asserted that

In practice, the U.S. approach to targeting in the conflict with al-Qa'ida is far more aligned with our allies' approach than many assume.

Finally, it appears that the government of Yemen has consented to at least some of the U.S. military attacks and the administration may be relying upon that consent as an alternative basis under international law for the use of force in that country.

Congress has not explicitly addressed the administration's interpretation of the AUMF as extending outside Afghanistan. There is a legitimate question whether the extension of hostilities to AQAP in Yemen ten years after enactment of the AUMF to a group not in existence at the time of its enactment is consistent with congressional intent. On the other hand, Congress' continued funding of military operations could be claimed to be ratification of the administration's view of its authorization.

There have also been objections to the administration's claims that it has met international law principles of *jus ad bellum* in carrying out U.S. military operations in Yemen. (This controversy was stoked and made more confusing by the administration's refusal until recently to even acknowledge its use of military force in Yemen.) In particular, many have challenged the government's claim that the U.S. armed conflict with al Qaeda extends to AQAP as a co-belligerent in Yemen, usually on the basis that Yemen is outside a "hot battlefield," and therefore outside the bounds of the armed conflict with al Qaeda.⁴ This objection however does not adequately account for the ongoing hostilities in Yemen involving AQAP, including its attacks against the U.S.^{ix} The stronger objection to the administration's claims that the U.S. armed conflict with al Qaeda extends to Yemen is that the administration has failed to clearly articulate what geographic limits, if any, exist on the scope of the armed conflict with al Qaeda and its associated forces. The administration has acknowledged that it is not free to use military force anywhere in the world as part of the armed conflict with al Qaeda, referencing the "laws of war" and state sovereignty, but has failed to explain what those limits would be in its view. See Brennan's September 2011 speech.

Finally, critics have also objected to the invocation of the self-defense rationale for U.S. operations in Yemen. It is not always clear whether the objection is based on the assertion that the actions of AQAP in Yemen do not constitute a sufficient "armed attack" to trigger the right of self-defense or the assertion that U.S. operations violate the *jus in bello* requirements for carrying out military operations in self-defense.

There has been less discussion of whether consent by the Yemeni government to U.S. military force would be sufficient under international *jus ad bellum* principles, probably because the facts concerning such consent are murky and the U.S. has not expressly claimed this basis for its operations.

Jus in bello: The distinguishing feature of the law of armed conflict is that it allows the intentional killing of enemy forces (and civilians directly participating in hostilities) subject to the principles of necessity, distinction, proportionality, and humanity. It thus differs fundamentally from constitutional restrictions on the use of law enforcement means or restrictions imposed by international human rights law, which do not allow the intentional killing of individuals except in much narrower and very different circumstances.

The LOAC also allows the military detention without charge of members of the enemy forces and in some cases of imperative security even of civilians. And it recognizes the

⁴ While the criteria under international law for finding the existence of an armed conflict may not be wholly settled, one approach considers the existence of an organized armed group and the intensity and duration of violence, both of which conditions seem to be met in Yemen.

legitimacy of military trials subject, of course, to limits on the jurisdiction of military courts and the use of appropriate due process procedures.

While there is little dispute about the applicability of the basic immunity for killing enemy forces to U.S. military operations in Afghanistan, there have been many controversies about the applicability of other rules of armed conflict since the U.S. invasion. The government claimed during the first Bush administration that common Article 3 of the Geneva Conventions prohibiting inhumane treatment did not apply to individuals captured in the “war on terror.” In 2006 the Supreme Court ruled in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), that Common Article 3 of the Conventions does apply to the armed conflict with al Qaeda, and thus it protects all detained individuals.

Since then government officials have asserted that while this is an unconventional war against an unconventional enemy – not state actors and not combatants who wear uniforms or identify themselves – the government will apply conventional law of war principles. The U.S. government has stated that the LOAC applies to *all* uses of military force by the U.S. against al Qaeda and its associates, by all agencies of the government, presumably including the CIA.^x The government has agreed in principle that it is bound by the LOAC rules of distinction, proportionality, necessity and humanity in all its military operations, including uses of lethal force by the CIA, whether such operations are armed conflict or self-defense operations.⁵ Accordingly, the government also claims that the military detention without charge in both Guantanamo and prisons in Afghanistan of individuals claimed to be enemy belligerents and the current military commission trials are likewise in accordance with the LOAC.

In particular, the U.S. claims that its intentional targeted killings of individuals in both AF/Pak and Yemen, including an American citizen, are permitted under the LOAC and are conducted in a manner to comply with international law. The legal objections to the targeted drone strikes at least outside of Afghanistan are based on at least two separate arguments. As mentioned above, some have argued that the use of military force by the U.S. in Yemen is illegal because it violates *jus ad bellum*; it is not a justified use of force under either the Constitution or international law. Others question whether the drone strikes violate the laws of war in the ways that targeting decisions are made or carried out.^{xi}

Whether these operations are legal or not, there are of course serious separate policy questions that need to be addressed concerning their wisdom, effectiveness and cost. These questions are beyond the scope of this memorandum.

Conclusion and additional questions:

We hope this memorandum will prove helpful in navigating the following questions:

- ☐ Is the current use of military force against citizens overseas legal? Should there be additional restrictions or procedures concerning such uses of force?

⁵ These general statements notwithstanding, it is not clear whether in some instances different rules or rationales are being applied to the use of lethal force by the CIA rather than the Defense Department.

- ☐ More generally, do the current programs using “targeted killings” comply with applicable international and domestic law? If so, then the policy issues concerning their effectiveness and wisdom can be addressed separately.
- ☐ Does the current practice of military detention without charge comply with applicable international and domestic law? If so, then the policy issues concerning its effectiveness and wisdom can be addressed separately.
- ☐ What will be the legal effect of the drawdown of U.S. combat forces in Afghanistan?
- ☐ What are the legal considerations concerning any determination to continue using military force a) in the places where it is now being used against al Qaeda, the Taliban or AQAP; or b) in other places against other groups, such as AQIM in North Africa. If the President determines that such continuing operations or new operations should be undertaken, does he need congressional authorization to do so?

The current controversies on the use of targeted lethal force and drones demonstrate the need for greater transparency by the administration concerning its current policy and operations. While the administration claims that its operations are legal and has provided some explanations for them, more information would further public and congressional understanding. Greater transparency would also enable the much needed debate on the wisdom of these policies to proceed without being mired in legal confusion.

Finally, greater transparency is a necessary prelude to any discussion of continuing military operations after the end of combat operations in Afghanistan or to expansion of military operations to any new theaters.

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¹ Jeh Johnson, “The Conflict Against Al Qaeda and its Affiliates: How Will It End?” (Oxford University, Oxford, U.K., November, 30 2012) <http://www.lawfareblog.com/2012/11/jeh-johnson-speech-at-the-oxford-union/>.

ⁱⁱ These include:

- “Department of Justice White Paper: Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa’ida or An Associated Force,” (November 8, 2011, leaked in February 2013);
- John O. Brennan, “U.S. Policy Toward Yemen,” (Council on Foreign Relations, New York, August 8, 2012);
- Jeh Johnson, “The Conflict Against Al Qaeda and its Affiliates: How Will It End?,” (Oxford University, Oxford, November 30, 2012);
- Eric Holder, “Attorney General Eric Holder Speaks at Northwestern University School of Law,” Chicago, March 5, 2012);
- Stephen W. Preston, “CIA and the Rule of Law,” (Harvard Law School, Cambridge, April 10, 2012);
- John O. Brennan, “The Ethics and Efficacy of the President’s Counterterrorism Strategy,” (Woodrow Wilson International Center for Scholars, Washington, DC, April 4, 2012);

-John O. Brennan, "Strengthening our Security by Adhering to our Values and Laws," (Harvard Law School, Cambridge, September 16, 2011);

-Harold Koh, "The Lawfulness of the U.S. Operation Against Osama bin Laden," (Opinio Juris Blog, May 19, 2011);

-John O. Brennan, "Remarks at the Brennan Center Symposium," (Brennan Center for Justice, New York University School of Law, New York, March 18, 2011); and

-Harold Koh, "The Obama Administration and International Law," (Annual Meeting of the American Society of International Law, Washington, DC, March 25, 2010).

ⁱⁱⁱ See Geoffrey S. Corn & Eric Talbot Jensen, "Untying the Gordian Knot: A Proposal for Determining Applicability of the Laws of War to the War on Terror," (January 14, 2008).

^{iv} Letter from the President to the United States Congress, "2012 War Powers Resolution 6-month Report," (June 15, 2012). <http://www.whitehouse.gov/the-press-office/2012/06/15/presidential-letter-2012-war-powers-resolution-6-month-report>.

^v In his June 15, 2012 War Powers Resolution 6-month Report to Congress, President Obama wrote that: "In a limited number of cases, the U.S. military has taken direct action in Somalia against members of al-Qaeda, including those who are also members of al Shabaab, who are engaged in efforts to carry out terrorist attacks against the United States and our interests." <http://www.whitehouse.gov/the-press-office/2012/06/15/presidential-letter-2012-war-powers-resolution-6-month-report>. The President used identical language in his War Powers Resolution letter to Congress dated December 14, 2012.

^{vi} E.g., Memorandum to Alberto Gonzalez from John Yoo, "Treaties and Laws Applicable to the Conflict in Afghanistan and to the Treatment of Persons of U.S. Armed Forces in that Conflict," (November 30, 2001).

^{vii} See for example S.C. Res. 1373, pmbl., U.N. Doc. S/RES/1373 (Sept. 28, 2001) (calling for international response to "terrorist attacks"); S.C. Res. 1368, para. 1, U.N. Doc S/RES/1368 (Sept. 12, 2001) (condemning September 11th attacks as "threat to international peace and security").

^{viii} When the Clinton administration attacked Bin Laden's camp in Afghanistan and a pharmaceutical plant in Sudan after the 1998 embassy bombing attacks, it relied upon the doctrine of self-defense, in lieu of either specific congressional or Security Council authorization.

^{ix} See Jeh Johnson's caution: "Many like to draw distinctions between on and off a so-called 'hot battlefield.' ... Further, I can envision a lot of debate and uncertainty about what constitutes the 'hot battlefield?'" Is it U.S. boots on the ground? If so, how many? Why should that be the test? What about Libya in 2011, for example? The distinction makes sense for developing policy, but I caution against the development of different legal regimes and standards on this basis." Jeh Johnson, "A 'Drone Court,' Some Pros and Cons," (Center for National Security, Fordham Law School, New York, March 18, 2013), <http://www.lawfareblog.com/2013/03/jeh-johnson-speech-on-a-drone-court-some-pros-and-cons/>.

^x Harold Koh, "The Obama Administration and International Law," (Annual Meeting of the American Society of International Law, Washington, DC, March 25, 2010).

^{xi} "The Civilian Impact of Drones: Unexamined Costs, Unanswered Questions," (Center for Civilians in Conflict and Human Rights Clinic at Columbia Law School, New York, October, 2012).



Center for National Security Studies
protecting civil liberties and human rights

Kate Martin
 Director

April 18, 2013

Memorandum to Interested Persons

Questions re legal authority for the U.S. use of lethal force using drones.

Despite the release of a Department of Justice White Paper, several speeches by high administration officials and innumerable articles, there is still much confusion concerning the U.S. government's basis for using targeted lethal force. Attached is a lengthy memorandum attempting to set out the general outlines of the government's claims. This shorter memorandum will outline a set of specific issues whose answers would provide needed clarity about lethal force operations in Afghanistan, Pakistan, Yemen and Somalia.

Preliminary observations. The U.S. government claims that all of its lethal force operations in these areas are conducted in accordance with the law of armed conflict (LOAC), i.e. international humanitarian law, including the fundamental principles of necessity, distinction, proportionality and humanity. Respect for the principle of distinction requires that only combatants be deliberately targeted and killed; civilians may not be targeted unless and only for the period during which they "directly participate in hostilities." The government also asserts that it follows the requirement of proportionality, that casualties should not be excessive in relation to the anticipated military advantage.

1. One of the current controversies is whether and where an armed conflict exists to which the U.S. is a party. The existence of an armed conflict is relevant to the legality of the claim that the government may act pursuant to the LOAC, i.e., deliberately target and kill enemy fighters, or alternatively must abide by peacetime rules, which prohibit such deliberate targeting and killing. There is little dispute that the U.S. is still engaged in an armed conflict in Afghanistan, along-side the Afghan government against both the Taliban and al Qaeda.

- a. The administration should outline whether in its view the United States is currently participating in an armed conflict in:
 The FATA or other regions of Pakistan; Yemen; or Somalia.
- b. The administration should spell out the basis for its determination that an armed conflict exists in any of these places and identify the parties to such conflict.
- c. The administration should identify all those groups which it has designated as "associated forces" in the "war against al Qaeda" and describe the criteria and process for making such determination.
- d. The administration should disclose any other places where the U.S. has used lethal force in the "war against al Qaeda."
- e. The conflict in Afghanistan and elsewhere is a non-international armed conflict (it is not a conflict between states). As is commonly the case in such conflicts, it is more difficult to distinguish between combatants and civilians. Some claim that targeting and detention rules applicable to combatants in an international armed conflict have no applicability in a non-international armed conflict and that therefore enemy fighters must be treated as civilians who can only be targeted while directly

participating in hostilities. The administration should explain its views on this question.

2. The administration has also relied upon the doctrine of “self-defense” as a basis for its lethal force operations.
 - a. The administration should explain whether this rationale is an additional rationale to the armed conflict rationale or a separate rationale for the use of lethal force in each of the places where it is being used.
 - b. The administration should confirm that in relying upon the “self-defense” rationale, it is referring to the doctrine of self-defense in the LOAC, as codified in Article 51 of the United Nations’ charter and not the doctrine of self-defense, which justifies the use of lethal force by law enforcement personnel.
 - c. The administration should state whether it agrees that a state may invoke the doctrine of self-defense only in the case of “an armed attack” or an imminent armed attack and that only violence by another state or an organized armed group can rise to the level of an “armed attack.” If the administration believes that the doctrine of self-defense can justify the use of lethal force against an individual acting alone, it should so state.
3. Who may be targeted as an enemy fighter, “combatant” under the LOAC? In the case of a conventional war, members of the enemy’s armed forces are deemed enemy combatants and they are generally identifiable simply by their uniforms. Administration officials have said that in this unconventional war, they are seeking to apply conventional rules.
 - a. What is the definition of “combatant” which the administration asserts complies with the LOAC in this conflict?
 - b. If the definition includes those who “support” al Qaeda, the Taliban or associated forces, as set forth in the NDAA, does the administration as a matter of law or policy use a limiting definition of “support”?
 - c. What rules or procedures does the administration use to ensure that there is in fact a sufficient link between an individual and the al Qaeda, Taliban or associated forces organizations to justify concluding that the individual is in fact a combatant and not entitled to the presumption of civilian status?
4. Targeting citizens as “combatants” under the LOAC. The administration has concluded that it may legally target citizens located overseas. Is it a correct reading of the Department of Justice White Paper that citizens may only be targeted if it would be legal to do so under the LOAC and therefore that the citizen must be determined to be a combatant with al Qaeda, the Taliban or associated forces? The White Paper appears to be limited to the question of the use of force against a subset of such combatants, individuals who are “senior operational leader of al-Qa’ida or an associated force of al-Qa’ida – that is, an al-Qa’ida leader actively engaged in planning operations to kill Americans.” Does the Justice Department White Paper set out *additional* requirements beyond LOAC requirements that have to be met before a citizen could be targeted, such as the targeted individual must pose an imminent threat of attack against the United States and that capture is infeasible?
5. Limits of authority. Has this administration determined that it would be legal to target a person *found in the United States* if that person was determined come within all the requirements set out in the White Paper?

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Drone Wars: The Constitutional and Counterterrorism Implications of Targeted Killing

Testimony Before the Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights

April 30, 2013

Statement for the Record Submitted By John W. Whitehead President, The Rutherford Institute

The United States government's use of drone technology to carry out a targeted killing program as part of its counterterrorism operations overseas was undertaken without any public discussion of the dangers of the technology, the reach of the program, the risks to innocent civilians, or the potential for blowback. Nor was Congress given the opportunity to establish any guidelines or limits as to the use of these remote-controlled killing machines.

The ramifications of such unilateral decision-making by the Executive Branch have been devastating on every front. First, America's targeted drone killing program, which has prematurely extinguished hundreds of civilian lives—men, women and children—and chalked their deaths up as unfortunate casualties of war, has made a mockery of the nation's attempts to serve as a human rights leader for the rest of the world.

Second, this tenuous system of worldwide assassination by the President, absent oversight by the other branches of government, runs afoul of international laws of war and the United States Constitution.

Third, the drone killing program undermines decades of foreign policy initiatives aimed at establishing common ground and a nuanced dialogue with the Middle East.

Fourth, if allowed to continue unchecked, the program will invariably foment ill will against America in the form of terrorist violence, blowback for our callous disregard for life.

Fifth, and no less important, the use of drones to target and kill individuals overseas, including American citizens, lays the groundwork for such tactics to be employed once drones take to the skies domestically. Already, in the wake of the Boston Marathon explosions, law enforcement officials have been increasingly vocal about their desire to include drone technology in their

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arsenal of surveillance and crowd control weapons.¹ However, no steps have yet been taken to establish effective safeguards for Americans' civil liberties and privacy rights. Until this oversight is rectified, we are all in imminent danger.

In light of the passage of the FAA Reauthorization Act, which according to estimates will see at least 30,000 drones take to the skies domestically by 2020, the urgency of this last point cannot be understated.

If we have learned one thing from the President's rash use of drones in the United States' counterterrorism efforts overseas, it is that this technology is too powerful, too lethal and too indiscriminate for us to allow it to be unleashed on the American populace before any real protocols to protect our safety and privacy rights have been put in place.

We cannot afford to wait until after these drones have been deployed domestically to ask the difficult questions and establish clear guidelines. Such an approach can only end in tragedy. Thus, while it is critical that Congress establish a regulatory framework for drone strikes abroad, it is no less critical and no less urgent that Congress be proactive in casting an eagle eye toward the use of drones domestically and establish an independent commission charged with regulating drone use in such a way as to ensure that Americans will not be targeted for killing or otherwise by weaponized surveillance drones.

In sum, allowing the executive branch to unilaterally craft a drone policy without any sort of legal framework within the bounds of the Constitution has led to civilian deaths, the radicalization of once benign foreign populations, and a massive expansion of presidential power beyond anything seen before. We must resolve these problems before they come home to roost.

The Rule of Law and Obama's Kill List

The government of the United States of America is predicated on the notion that the law is supreme, and that no person, no matter how high-ranking, is able to flout it. As Thomas Paine observed in *Common Sense*, "in America, the law is king. For as in absolute governments the King is law, so in free countries the law ought to be king; and there ought to be no other." In the post-9/11 era, however, we have forgotten about this critical safeguard against tyranny, and have instead allowed the president and his advisors to run roughshod over the Constitution, which has put the security and liberty of the American people in grave danger.

This fact was illustrated clearly in May 2012, when the *New York Times* revealed the existence of a presidential "kill list," a collection of suspected terrorists whom President Obama and his cohorts determined could be dispatched by drone rocket attacks in countries with which the United States is not at war, including, but not limited to, Yemen, Somalia, and Pakistan. The

¹ Ben Wolfgang, "Drone wars: Battle intensifies over domestic drone use after Boston Marathon bombing," *Washington Times* (April 24, 2013), <http://www.washingtontimes.com/news/2013/apr/24/boston-police-want-drones-for-marathon-security/?page=all>.

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existence of this list is proof positive that the rule of law in America is under threat, as one individual, namely President Obama, has imbued himself with the powers of judge, jury, and executioner.

Every other week, the President convenes with a number of advisors at so-called "Terror Tuesday" meetings, during which time they pick the next unlucky suspected terrorists approved for death by drone. Of course, these targeted strikes are notoriously imprecise, so Obama is not only commanding the death of possible terrorists, but that of civilians situated nearby. The determinations, while seemingly based upon solid facts about who is a direct threat to the United States, are increasingly specious, as low-level terrorists and new recruits, and even simply people carrying weapons, are now approved for targeted assassinations. As an anonymous government official familiar with the drone program observed, "They count the corpses and they're not really sure who they are."² In fact, the first drone strike which Obama authorized in Yemen led to the deaths of 14 women and 21 children. Only one al-Qaeda affiliate was killed.³

This extralegal assertion of executive power represents an astounding attack on the United States Constitution, far more egregious than anything seen during the Bush administration. For the President to claim that he has the power to engage in assassinations on a global scale represents a drastic evolution in the scope and scale of executive power.

The Assassination of American Citizens

Unfortunately, Kill Lists and Terror Tuesday meetings are just the tip of the iceberg, for President Obama is not only targeting foreign citizens, but American citizens as well. A man who in the media appears to be engaged in a protracted internal struggle of how best to apply the law and maintain moral legitimacy, Obama seems unfazed by his decision to assassinate American citizens with drones. In fact, he has gone on record saying that his decision to order the assassination of U.S. citizen Anwar al-Awlaki was "an easy one." Al-Awlaki's 16-year-old son, Abdulrahman, also a U.S. citizen, met the same fate.

The murder of the elder and younger al-Awlakis represents a turning point in American history. We have entered an era in which any executive action, up to and including murdering an American citizen, can be justified under vague notions of national defense and combatting terrorism. These "justifications" are codified in a Justice Department memo leaked to the press in February 2013, in which government officials acting under Attorney General Eric Holder asserted that the president has the ability to target an American citizen for assassination via drone so long as he believes for whatever reason that the person might, at some point in the future, pose a threat to the country.

² Jo Becker and Scott Shane, "Secret 'Kill List' Proves a Test of Obama's Principles and Will," *New York Times*, May 29, 2012, http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?_r=2&hp&pagewanted=all.

³ Ibrahim Mothana, "How Drones Help Al Qaeda," *New York Times*, http://www.nytimes.com/2012/06/14/opinion/how-drones-help-al-qaeda.html?_r=1.

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This represents a direct assault on the United States Constitution, which demands that government officials abide by the due process of law before causing harm to an American citizen or taking his life. Believing he and his advisors to be exempt from these requirements, President Obama asserts the right to assassinate a U.S. citizen via drone without formally charging him with any crime, and without allowing for any judicial review of his decision.

The specious legal reasoning hinges on the notion that a person may only be targeted for assassination if their capture is “infeasible” and the threat they pose to the United States is imminent. Infeasibility of capture, in the logic of the Department of Justice, simply means that a person cannot be arrested without putting American troops in harm’s way, so by definition any person the United States would be interested in capturing from a foreign country becomes infeasible to capture. Furthermore, borrowing from the playbook of President George W. Bush, the Obama administration has chosen to ignore the commonly accepted definition of the word imminence, and instead claims that the imminence requirement “does not require the United States to have clear evidence that a specific attack on U.S. persons and interests will take place in the immediate future.”⁴

These claims would be laughable if the stakes weren’t so high. Unfortunately, this is quite literally a life or death situation, for both potential targets of Obama’s drone program and the country at large.

The Role of the Department of Justice

Alongside Obama, Attorney General Eric Holder has played a major role in the steady erosion of the rule of law over the past few years. His legal acrobatics have involved redefining core concepts of law which have been around since the signing of the Magna Carta. For example, in a March 5, 2012 speech at the Northwestern University School of Law, Holder declared that “The Constitution guarantees due process, not judicial process.” What Holder was attempting to suggest is that the Fifth Amendment’s assurance that “No person shall be deprived of life, liberty, or property without due process of law” does not necessarily involve having one’s day in court and all that that entails—it simply means that a process occurs, in this case, the president reviewing evidence before ordering someone’s death. As one history professor warned, “Insert even a sliver of difference between due process and judicial process, and you convert liberty into tyranny.”⁵

In an attempt to mask these attacks on the Constitution, Justice Department lawyers have created certain guidelines to govern the vetting process for selecting targets to be assassinated. These

⁴ “Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa’ida or an Associated Force,” p. 7, http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf.

⁵ Robert Zaller, “Eric Holder and the day the Constitution died,” *The Triangle* (May 18, 2012), <http://thetriangle.org/2012/05/18/eric-holder-and-the-day-the-constitution-died/>.

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“guidelines” – if one were to consider a series of exceptions to the rule of law guidelines - in the memo from the Department of Justice purport that only “senior operational leaders” of al-Qaeda and “associated forces” are targeted. However, recent evidence indicates otherwise.

A recent report by *McClatchy* reveals that the Obama administration’s assurances that it is only targeting senior operational leaders in al-Qaeda and allied forces for death by drone is false. In fact, they are targeting a number of low-level so-called militants and extremists, many of whom have never participated in an attack against the American homeland, nor are imminently planning to do so.⁶

All of the aforementioned demonstrates President Obama’s crass indifference to human life, to upending the rule of law, and to dismantling everything that stands between the constitutional republic which we are supposed to be and the soft dictatorship which we have become.

Failure to Secure the Homeland

What is the purpose of all of this? Ostensibly it is to make the United States of America safe from foreign enemies. On the contrary, President Obama’s Drone Wars have done little to provide further protection to the American people, and may in fact be jeopardizing the nation’s security. Drone strikes have provided a rallying cry for the few radical militant groups left. As Ibrahim Mothana, a Yemeni democracy activist, noted in an op-ed in the *New York Times*, “Drone strikes are causing more and more Yemenis to hate America and join radical militants; they are not driven by ideology but rather by a sense of revenge and despair.”⁷

Those acquainted with the reality of America’s drone policy and military decision making realize the gravity of the situation. Retired general Stanley McChrystal has said that drone strikes are “hated on a visceral level” and feed into a “perception of American arrogance.”⁸

The ultimate irony, of course, is that Obama is creating a foreign policy quagmire similar to the ones which in part led to the 9/11 attacks in the first place. Bombing campaigns and foreign occupations were the rallying cry for al-Qaeda militants in the years before 9/11. Drone strikes perpetuate this cycle of violence, creating another situation to be exploited by terrorist groups abroad.

One need only speak with those living under the watchful presence of drones to understand why drone strikes can radicalize a population. In Pakistan the psychological impact of constant

⁶ Jonathan S. Landay, “Obama’s drone war kills ‘others,’ not just al Qaeda leaders,” *McClatchy*, (April 9, 2013), <http://www.mcclatchydc.com/2013/04/09/188062/obamas-drone-war-kills-others.html#storylink=cpy>.

⁷ Ibrahim Mothana, “How Drones Help Al Qaeda,” *New York Times*, http://www.nytimes.com/2012/06/14/opinion/how-drones-help-al-qaeda.html?_r=1.

⁸ Robert F. Worth, Mark Mazzetti, and Scott Shane, “Drone Strikes’ Dangers to Get Rare Moment in Public Eye,” *The New York Times*, (February 5, 2013), http://www.nytimes.com/2013/02/06/world/middleeast/with-brennan-pick-a-light-on-drone-strikes-hazards.html?pagewanted=all&_r=0.

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surveillance, as well as the possibility of a violent attack on civilian populations, has already taken its toll on the people.

A joint study conducted by the NYU School of Law and Stanford University Law School released in September 2012 demonstrates the way in which civilian populations in areas of Pakistan where drone strikes are common have altered their behavior in response to the threat of death from above. Humanitarian workers refuse to help victims of drone strikes because the United States is known to attack rescuers. People avoid gathering in large groups for fear of being targeted, so community meetings are generally off the table. Parents are weary to send their children to school, for fear that they will be caught in the crossfire. In short, as the report notes, the drone policy in Pakistan “terrorizes men, women, and children.”⁹

Drones Are Coming Home

Ultimately, the danger of Obama’s drone policy is not simply what happens on the other side of the world. It is what will happen within the American homeland, as drones are being rapidly integrated into the American airspace over the next few years.

As Peter Singer, a senior fellow at the Brookings Institution and expert on the proliferation of drone technology, has noted, drones are a “game-changing technology, akin to gunpowder, the steam engine, the atomic bomb—opening up possibilities that were fiction a generation earlier but also opening up perils that were unknown a generation ago.”¹⁰

We are plowing headfirst into this new era, and with little thought to what might be around the corner. Through a combination of defense lobbying and zealous advocacy by military brass, drones have become a mainstay of American life for the foreseeable future and a cornerstone of the emerging police state. Since 2007, the Federal Aviation Administration (FAA) has provided permits to 1,428 drone operators within the United States, 327 of which are still active. According to the FAA, there are six test sites planned for the integration of drones into US airspace, and within five years we will see 10,000 drones take to the sky.¹¹

While these drones will occasionally be put to good uses, such as tracking wildfires and other environmental disasters, or locating missing persons, more often they will be used to expand the already pervasive American surveillance state. They will become routine tools of surveillance, used to track people going about their daily business. They will become tools for corralling and controlling protestors and dissenters, adding a frightening twist to police crackdowns as seen during the Occupy Wall Street movement in 2011.

⁹ Glenn Greenwald, “New Stanford/NYU study documents the civilian terror from Obama’s drones,” *The Guardian*, (September 25, 2012), <http://www.guardian.co.uk/commentisfree/2012/sep/25/study-obama-drone-deaths>.

¹⁰ David Wood, “American Drones Ignite New Arms Race From Gaza To Iran To China,” *The Huffington Post*, (November 27, 2012), http://www.huffingtonpost.com/2012/11/27/american-drones_n_2199193.html.

¹¹ Brian Bennett and Joel Rubin, “Drones are taking to the skies in the U.S.,” *The Los Angeles Times*, (February 15, 2013), <http://www.latimes.com/news/nationworld/nation/la-na-domestic-drones-20130216.0,1021089,full.story>.

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Michael Downing, the LAPD deputy chief for counter-terrorism and special operations, has expressed his enthusiasm for drone technology. He envisions them being flown over large-scale media events such as the Oscars, using them to surveil political protests, and flying them through buildings to track criminal suspects.¹²

This surveillance state will be fueled by the military-industrial complex, and defense contractors are itching for a stake in the booming drone market, hence why two of the largest drone manufacturers, General Atomics and AeroVironment, spend \$2 million and \$1 million respectively lobbying Congress members to advocate for the introduction of drones into American airspace.¹³

The affordability of drones will make them an easy sell for most police departments. While manned airplanes and helicopters can cost \$600/hour to operate, a drone can be put in the sky for less than \$25/hour.¹⁴ Their relative affordability is bolstered by a \$4 million Homeland Security program which encourages local law enforcement to adopt drone technology as quickly as possible.¹⁵

In fact, drones are already being used for routine police surveillance. Since 2005, US Customs and Border Patrol have been utilizing drones in order to secure the Mexican border.¹⁶ In 2011, police in North Dakota used a Predator drone to conduct surveillance on a farming family before arresting them for an alleged cattle theft.¹⁷ Police in Mesa County, CO used drones to photograph vandalism at a public school, evidence which was then used to prosecute the crime.¹⁸ This spring, police in California will begin using Qube drones, which are capable of hovering for 40 minutes at heights of about 400 ft. to conduct surveillance on targets as far as 1km away.¹⁹

The rapid adoption of this technology is being undertaken without any regulations in place to protect the privacy and civil liberties of Americans in the drone age. Combined with the Obama

¹² Brian Bennett and Joel Rubin, "Drones are taking to the skies in the U.S.," *The Los Angeles Times*, (February 15, 2013), <http://www.latimes.com/news/nationworld/nation/la-na-domestic-drones-20130216,0,1021089,full.story>.

¹³ Glenn Greenwald, "The growing menace of domestic drones," *Salon*, (December 12, 2011), http://www.salon.com/2011/12/12/the_growing_menace_of_domestic_drones/.

¹⁴ Brian Bennett and Joel Rubin, "Drones are taking to the skies in the U.S.," *The Los Angeles Times*, (February 15, 2013), <http://www.latimes.com/news/nationworld/nation/la-na-domestic-drones-20130216,0,1021089,full.story>.

¹⁵ Lev Grossman, "Drone Home," *TIME*, (February 11, 2013), <http://www.time.com/time/magazine/article/0,9171,2135132,00.html>.

¹⁶ Lev Grossman, "Drone Home," *TIME*, (February 11, 2013), <http://www.time.com/time/magazine/article/0,9171,2135132,00.html>.

¹⁷ Brian Bennett, "Police employ Predator drone spy planes on home front," *The Los Angeles Times*, (December 10, 2011), <http://articles.latimes.com/2011/dec/10/nation/la-na-drone-arrest-20111211>.

¹⁸ Larry Abramson, "Drones: From War Weapon To Homemade Toy," *NPR*, (August 2, 2012), <http://www.npr.org/2012/08/02/157441681/drones-from-war-weapon-to-homemade-toy>.

¹⁹ "Drone technology could be coming to a Police Department near you," *KESQ*, (February 26, 2013), <http://www.kesq.com/kesq/Drone-technology-could-be-coming-to-a-Police-Department-near-you/-/232254/19098288/-/wph5eoz/-/index.html>.

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administration's intransigence on the issue of assassinating American citizens, this implementation of drone technology in American airspace does not bode well.

Micro-Drones and the Future of American Freedom

In reality, we are on the cusp of a technological revolution which will upend our concepts of society, freedom, justice, and law. Beyond the Predator and Reaper drones which are currently patrolling countries abroad, as well as our nation's borders, the US government and various defense contractors are working on creating micro aviation vehicles, or micro-drones. These drones are modeled after birds, insects, and other small animals, with the intention of creating small surveillance devices that can remain hidden in plain view while navigating spaces off limits to conventional aircraft.

For example, in 2011, DARPA, the advanced research division of the Department of Defense, released its prototype for a "Nano Hummingbird."²⁰ Shaped like a bird, this drone is negligibly larger than an actual hummingbird and can fit in the palm of one's hand. It flits around effortlessly, blending in with its surroundings.

In June 2012, researchers at the University of Pennsylvania revealed drones similar to DARPA's hummingbird called "Nano Quadrators."²¹ These small, four-propellered drones operate based upon the flight dynamics of insects, enabling them to operate as a swarm. Using twenty drones, University of Pennsylvania researchers demonstrated how, moving compactly as a unit, the drones were able to navigate obstacles, form complex patterns, and even execute a fluid figure eight arrangement.

In 2012, Israel unveiled its new insect-inspired drone which they dubbed the "spy-butterfly" because of its two sizable wings. Weighing in at only 20g, this drone was developed for indoor surveillance, including public places such as "train stations and airport terminals—or office buildings." The size and muted sound of the "virtually noiseless" machines makes them unnoticeable and therefore ideal for intelligence gathering. The spy-butterfly is so realistic that, when tested, "birds and flies tended to fall behind the device arranging into a flock."²²

As exemplified by the aforementioned micro-drones, the drones we will see in America will be much smaller in size than the ones being used abroad. They will be able to take off and land anywhere, able to maneuver through city streets and hallways, and able to stop and turn on a dime, giving them a fluidity of movement that no conventional aircraft can match. They will be

²⁰ "Robot Hummingbird Spy Drone with Camera," *YouTube*, (March 3, 2011), http://www.youtube.com/watch?feature=player_embedded&v=K1EYpAqqC2s#t.

²¹ "US military surveillance future: Drones now come in swarms?" *RT*, (June 20, 2012), <http://rt.com/news/us-drones-swarms-274/>.

²² "Spy-Butterfly: Israel developing insect drone for indoor surveillance," *RT*, (May 19, 2012), <http://rt.com/news/israel-drone-indoor-butterfly-672/>.

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equipped with all sorts of weapons and sensors, including tasers, bean-bag guns,²³ “high-resolution video cameras, infrared sensors, license plate readers, [and] listening devices.”²⁴

One type of drone sensor, the Gorgon Stare, can keep track of an area 2.5 miles across from 12 different angles. A drone equipped with this technology can quite literally spy on an entire city at once. Another sensor system, ARGUS, can find an object that is only 6 *inches* long, from 20,000 feet up in the air.²⁵ They will be able to hover over cityscapes and public events for long periods of time, providing a means of 24/7 surveillance.

Perhaps the most disturbing development in drone technology, DARPA has even begun to develop a Micro-Electro-Mechanical System (MEMS) for the manipulation of insects into “cyborgs.”²⁶ Through genetic engineering, they might actually control the movement of insects and utilize them for surveillance purposes. While the project is still in its infancy, its implications are frightening.

The Need for Legislation to Protect Americans’ Civil Liberties

The Rutherford Institute has been particularly vocal about the need for legislation to prohibit the federal government from using data recorded via surveillance drones in criminal prosecutions so as to guard against the eventuality of a total surveillance society, in which all Americans become suspects to be tracked by government agents on the off chance that they might commit a crime. The Institute has also pressed for a ban on federal agencies utilizing drones outfitted with weapons and anti-personnel devices, whether lethal or non-lethal.²⁷

No matter where one stands on the issue of drone use domestically, it is clear that we need to take a more cautious and well-reasoned approach on how drone technology will be implemented and what safeguards are necessary to ensure that Americans’ safety, privacy, and civil liberties are not jeopardized.

²³ Robert Stanton, “Texas civil libertarians have eye on police drones,” *The Houston Chronicle*, (October 31, 2011), <http://www.chron.com/news/houston-texas/article/Texas-civil-libertarians-have-eye-on-police-drones-2245644.php>.

²⁴ Brian Bennett and Joel Rubin, “Drones are taking to the skies in the U.S.,” *The Los Angeles Times*, (February 15, 2013), <http://www.latimes.com/news/nationworld/nation/la-na-domestic-drones-20130216,0,1021089,full.story>.

²⁵ Lev Grossman, “Drone Home,” *TIME*, (February 11, 2013), <http://www.time.com/time/magazine/article/0,9171,2135132,00.html>.

²⁶ Nick Turse, “Tomgram: Nick Turse, The Pentagon’s Battle Bugs,” *Tom Dispatch*, (March 30, 2008), <http://www.tomdispatch.com/post/174912>.

²⁷ Proposed “Freedom from Drone Surveillance Act,” The Rutherford Institute, https://www.rutherford.org/files_images/general/Drone_Legislation_09-18-2012.pdf.