

**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.