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 paper[3]—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 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.