Senate Judiciary Committee
"'Targeted Killing' and the Rule of Law: The Legal and Human Costs of 20 Years of U.S. Drone Strikes" Hearing
Questions for the Record
Senator Amy Klobuchar

For Stephen Pomper, Chief of Policy, International Crisis Group

At the hearing you called on Congress "to restore constitutional balance on matters of war and peace." You also noted that the Framers divided the war power between the Congress and the executive branch, giving Congress "the power to declare war because of its deliberative nature, which they believe[d] would be a brake on imprudent war-making."

- **How does the Constitution's division of war power authority help ensure public awareness about decisions to go to war and better ensure political accountability?**

  By vesting Congress with the authority to declare war and various associated powers, the Constitution creates a mechanism for inter-branch deliberation and debate over questions about whether, where and when the United States goes to war. If properly implemented, this mechanism can help ensure that these questions are vetted in front of the American public, and provide members of Congress the opportunity to seek input from both their constituents and outside experts. Such public deliberation and debate can in turn better ensure that the costs and benefits of potential conflict are adequately weighed by the country's political leadership than decisions taken solely within the Executive Branch.

You noted in your testimony that "allowing the executive branch to determine the scope of a conflict without public deliberation… makes it very difficult for both the public and the Congress to assess the extent to which conflict has outlived some or all of its purposes."

- **What are the most effective tools Congress has to ensure that the use of military force remains within the bounds of the authority it grants to the executive branch?**

  Congress can and should legislate clearer boundaries for the Executive Branch when it comes to the use of military force. In particular:

- Congress should update the 2001 Authorization for Use of Military Force (2001 AUMF) to, among other things, identify the groups against whom force may be used, specify where force may be used, and impose a two- or three-year reauthorization requirement. A fuller set of recommendations for 2001 AUMF reform can be found here.

- Congress should reform the 1973 War Powers Resolution (WPR) along the lines proposed in the bipartisan National Security Powers Act and its companion House legislation, the National Security Reforms and Accountability Act. Among other things, this legislation would introduce definitions that the WPR lacks, shorten the amount of time that the executive branch is able to engage in hostilities without congressional authorization, and deny funding for the pursuit of conflicts that Congress has not authorized. A fuller discussion of proposals for WPR reform can be found here.

Written Questions for the Record – Stephen Pomper
Submitted by Senator Patrick Leahy
February 16, 2022

1. By all objective accounts, the U.S. military has failed to acknowledge the full civilian toll of its actions abroad. There are a number of reasons for this. Some stem from flawed methodologies, such as failing to conduct on-site investigations. Some are caused by questionable delegations of responsibility, like having a unit responsible for a lethal strike investigate its own actions.

    a. **How does the Department of Defense work with other organizations to track civilian casualties?**

    Although the Department of Defense is best able to describe their relationships with outside organizations tracking civilian casualties, in my experience the Pentagon is in regular dialogue with humanitarian and advocacy organizations on issues related to civilian casualties. My sense, however, is that both the Pentagon and other Executive Branch officials are sometimes too quick to discount civil society claims about civilian harm, particularly in areas where the U.S. government is not present and has not itself verified those claims.

    b. **What could the Department of Defense do to improve the way it tracks the number of civilian casualties caused by lethal strikes?**

    The Department of Defense could take several steps to better track civilian casualties, including these two: First, the Pentagon should more clearly define the term "combatant," particularly in the context of non-international armed conflicts. This will encourage greater rigor in counting combatant and non-combatant casualties. Second, the U.S. military should consider adopting some of the techniques used by journalists and non-governmental organizations investigating civilian casualties, including interviewing witnesses and visiting the sites of alleged civilian casualty incidents.

2. The Obama administration required a "near certainty" standard for strikes to avoid civilian casualties, but the Trump administration introduced a less protective standard of "reasonable certainty."

    a. **Would returning to that standard reduce civilian deaths? If we did return to a near certainty standard, would that be compliant with the "all feasible precautions" standard that many U.S. allies regard as a requirement of international law?**

    While a return to the "near certainty" standard is likely to be protective of civilian life and therefore would be welcome, the best way to ensure that the U.S. applies the "all feasible precautions" standard would be for the Executive Branch to

announce that it considers this standard to be required as a matter of customary international law.

b. If the near-certainty standard was insufficient to take "all feasible precautions" what kind of standard could be compliant?

As noted above, the best way to ensure that the U.S. applies the "all feasible precautions" standard would be for the Executive Branch to announce that it considers this standard to be required as a matter of customary international law.

3. In your testimony before the committee you spoke about the United States' approach to anticipatory self-defense and its reliance on the contested "unwilling or unable" test. Using the "unwilling or unable" test the United States has claimed it may use force against non-state actors on the territory of a third state, if the third state is unwilling or unable to address the threat posed by the non-state actor. This interpretation provides the executive branch far-reaching latitude to conduct lethal strikes even when the United States has declined to provide an international legal justification for the threat or use of force.

a. Has the "unwilling or unable test" become a part of customary international law? If so, should the United States continue to rely on it when conducting counterterrorism operations in third party countries against non-state actors?

While the U.S. view is that the "unwilling and unable" test is enshrined in international law, that view is contested by some states and non-governmental experts. A survey of state practice as of 2016 can be found here.

4. Successive administrations have taken a flexible view as to who qualifies as a combatant under the Department of Defense's Law of War Manual when conducting lethal strikes. In a December 18 New York Times article[1], the Times investigated a July 2016 strike in which more than 120 civilians were killed at three ISIS staging areas. The investigation conducted by the military concluded that only 24 civilians were "intermixed" with the combatants. Positive identification of enemy combatants is one of the primary considerations during the drone targeting process yet ordinary civilians are routinely mistaken for combatants.

a. Do you believe field commanders should presume individuals are civilians when in doubt? If so, would this change better align the United States with partner militaries who have more comprehensive standards for avoiding civilian harm?

As I stated in my testimony before the Committee, in contrast to the view of some U.S. partners, the Department of Defense's Law of War Manual does not indicate that in cases of doubt individuals should be presumed to be civilians. Greater

[1] Azmat Khan, *Hidden Pentagon Records Reveal Patterns of Failure in Deadly Airstrikes*, N.Y. TIMES (Dec. 18, 2021), https://www.nytimes.com/interactive/2021/12/18/us/airstrikes-pentagon-records-civilian-deaths.html.

clarity about the definition of “combatant” and a commitment to the “all feasible precautions” standard could help avoid civilian harm.

Questions for the Record from Senator Charles E. Grassley
Hearing on "'Targeted Killing' and the Rule of Law: The Legal and Human Costs of 20 Years of U.S. Drone Strikes"
February 9, 2022

Stephen Pomper
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1. **Do terrorist organizations hide within civilian populations or utilize civilians as a shield from drone strikes?**

The use of human shields – whether by states or armed groups – is unlawful but does sometimes occur in warfare. The use of human shields does not permit the attacking party to look past law of war requirements, including those relating to proportionality and distinction. Section 5.12 of the Department of Defense Law of War Manual recognizes that law of war requirements continue to apply to the attacking party in human shield situations in stating that:

> *If civilians are being used as human shields, provided they are not taking a direct part in hostilities, they must be considered as civilians in determining whether a planned attack would be excessive, and feasible precautions must be taken to reduce the risk of harm to them.*

2. **Would requiring certainty that no civilians are present in order to target a terrorist combatant incentivize terrorists to employ human shields?**

The prudential standard imposed by the Obama administration as a matter of policy required "near certainty" that non-combatants would not be killed or injured in certain operational contexts. It did not require "certainty." I do not have information about whether the near certainty standard affected the calculations of targeted groups and individuals.

3. **Are ISIS and Al Qaeda still targeting Americans at home and abroad?**

The below excerpt from a September 2021 International Crisis Group report – "Overkill: Reforming the Legal Basis for the U.S. War on Terror" – summarizes the views of current and former officials and Congressional staff who were interviewed on the nature of the threat posed by jihadist groups to the United States. (Citations, omitted here, can be found in the original text.)

> *One striking feature of the U.S. policy debate is how little consensus there is on fundamental issues, including the nature of the threat that jihadists pose to the United States. Many former officials say it is difficult to reach a firm view on the threat to the U.S. homeland. Current and former officials noted that in terms of*

sheer numbers, according to some sources, there are more jihadists today than in 2001. Although ISIS and al-Qaeda in the Arabian Peninsula both had the capacity to mount major coordinated attacks in Europe in the past decade, the U.S. is a more challenging target partly because it lies across the Atlantic Ocean. Further, groups that at one time may have possessed both the intent and capability to conduct operations against the U.S., such as al-Qaeda and ISIS, have lost the capability, in part because U.S. operations have degraded it.

This scepticism about jihadist groups' transnational designs echoes Crisis Group's own findings. Al-Qaeda and ISIS-linked groups in principle share the global movements' transnational goals, including attacking the West. In reality, though, Crisis Group's research paints a picture of groups that for some years now have been primarily concerned with national or local struggles. Indeed, some groups may well see transnational force projection as in tension with their local interests because of the risk that the U.S. could stage armed intervention to punish or thwart those with global aspirations. Clearly, such groups pose a huge challenge in many parts of the world – and, perhaps, in some cases to U.S. interests in those parts of the world – but their preoccupation with local battles means that the threat they pose further afield appears significantly diminished from what it was some years ago.

Of transnational militant groups, former U.S. officials cited core al-Qaeda (including elements in north-western Syria), al-Qaeda in the Arabian Peninsula and ISIS as posing the greatest threat to the U.S. homeland. Both current and former officials considered the risk of unsophisticated attacks by lone gunmen to be considerably greater than sophisticated, large-scale attacks akin to the events of 9/11. Former and current U.S. officials noted that Shiite paramilitary groups, including Hizbollah, had the most formidable capabilities to conduct external attacks, if not necessarily the intent to attack the U.S. homeland.

Both U.S. officials and Congressional staff expressed concerns about potential terrorist threats from Africa, particularly the Sahel and West Africa, due to instability and the strength of jihadist groups in the region. Several of these officials assessed that though there was no immediate threat to the U.S. homeland from these regions, it was conceivable that one would emerge within a decade, with one official likening West Africa in 2021 to Afghanistan in the 1990s.

U.S. officials are divided over whether any of these groups pose a sufficient threat to the U.S. homeland to merit war upon them. Several former officials cautioned against the United States prematurely declaring victory in the war on terror. In contrast, another official assessed that attacking the U.S. homeland is no longer a major jihadist goal. A current U.S. official judged that the threat to

the U.S. homeland had always been overstated. In his view, al-Qaeda got very lucky on 9/11 and that attack was an exceptional event. In the same vein, yet another U.S. official characterised the 9/11 attacks as al-Qaeda's "one lucky punch" that would be hard to reprise. This official also questioned whether ISIS would have targeted the West had the U.S. not initiated its air campaign against the group in 2014, a point echoed by other former U.S. officials.

In general, current and former officials found it challenging to offer a firm assessment of the threat to the U.S. homeland from jihadism, or of the effectiveness of the use of force, as opposed to other measures the U.S. has taken, in preventing another jihadist attack on the United States. In addition to uncertainty about groups' intentions and capabilities, officials noted that there have been significant advances in defensive U.S. counter-terrorism tools after 9/11. Such tools include no-fly lists, improved coordination between intelligence agencies and law enforcement, and measures as simple as armoured and locked cockpit doors in civilian airliners. One former official noted that since 9/11, the U.S. has created civilian security agencies such as the Department of Homeland Security and the Transportation Security Administration, as well as focusing federal, state and local law enforcement on terrorism, and that all these steps likely played some role in mitigating the threat to the U.S.

Former U.S. officials and Congressional staff interviewed by Crisis Group were doubly wary of offering definitive assessments because they lack access to current classified intelligence. While Crisis Group similarly lacks such access, its research on Salafi jihadists in recent years indicates that these groups are primarily focused on local or at most regional concerns, as stated above.

4. Would ISIS and Al Qaeda members kill Americans if they could?

This is covered in my response to Question 3.

5. Is it your contention that all drone strikes are unwarranted regardless of circumstances?

In my testimony, I did not purport to assess whether and where military force has been or continues to be a necessary and effective tool for countering jihadist threats to the United States. I did contend, however, that the use of military force incurs significant costs – including for innocents caught in the crossfire – and is underexamined. As I noted in my written testimony:

Much about the war on terror is hidden. We hear about it when there is a big success, as with the raid that led to the death of ISIS leader Abu Ibrahim al-Hashimi al-Quraishi in Idlib, Syria … We also sometimes hear when something goes terribly wrong, as with the deaths of four U.S. servicemembers at Tongo,

Niger, in 2017, or when stories emerge in the media about previously undisclosed mass civilian casualties.

But much of the time we do not hear about it at all. We do not know exactly who the U.S is fighting or where. We do not know what success in this conflict is supposed to look like. We do not have a reliable sense of who is being killed or why they are being killed. This is in part for operational reasons: counter-terrorism has come to mean light foot-print operations in remote locations that evade easy monitoring.

There is also an institutional explanation, however. The development, prosecution and oversight of this war has largely been handed over to the executive branch. Successive administrations have developed legal and policy doctrines that allow them to expand the scope of the conflict unilaterally. Rather than seek authority from Congress, they turn to their own lawyers to seek interpretations of pre-existing statutes that Congress never contemplated. They decide what sorts of safeguards are appropriate to guard against civilian casualties and too often fail to apply them rigorously.

This approach is problematic. From the rule of law perspective, it is problematic because it has been characterized by a lack of transparency and seemingly ad-hoc rule-making in the absence of effective checks and balances. From the humanitarian perspective, it is problematic because it may unnecessarily expose innocent civilians to harm. From a strategic perspective, it raises the question of whether the United States is over-extended militarily at a time when it faces so many global and strategic challenges. And from the perspective of wanting to turn the page, it is problematic because it has allowed the executive branch substantial latitude to perpetuate and expand the present war without a robust discussion of its costs.

As for how to begin to remedy this situation, I recommended the following in my written testimony:

As concerns civilian casualties, the Department of Defense has long been urged by scholars and civil society to adjust its "feasible precautions" standard to match the "all feasible precautions" benchmark that many U.S. allies regard as a requirement of international law. It should do so, while also tightening its definition of who is targetable, and adjusting its protocols so that there is more reliable reporting and investigation of civilian casualty incidents. Because of the institutional challenges the Pentagon has faced in the latter task, it should consider bringing in experts from outside the chain of command – even from outside the executive branch – to ensure the work is rigorously done.

But changes like these are no surrogate for a broader inquiry about the war itself, and about the executive branch's war-making powers. That will require Congress to reassert its Constitutional prerogatives on matters of war and

peace. The Framers invested this body with the Declare War power for a reason: It is the most representative of the three branches of government and, because of its deliberative nature, the most apt to place a brake on imprudent war. Congress should begin to reclaim this role with two mutually reinforcing steps.

First, Congress should debate and decide the extent to which the U.S. must remain on a war- footing in order to meet the terrorist threats that it faces. Depending on the outcome of that discussion, it should replace the 2001 AUMF [Authorization for Use of Military Force] with a more narrowly targeted law that identifies the specific groups Congress authorizes war against, the locations where that war may be conducted, and the mission that the war is seeking to achieve. The revised statute should remove the capacity of the executive branch to change the scope of the war by adding new "associated" or "successor" forces without first obtaining congressional permission. To ensure that elected officials are required to examine whether the conflict is actually achieving its stated objectives, it should include a date no more than two or three years into the future by which the statute will lapse absent reauthorization.

Second, taking the longer view, Congress should replace the 1973 WPR [War Powers Resolution] with a revised statute that narrows the executive branch's discretion to wage unilateral war to the realm of true self- defense. The bipartisan draft National Security Powers Act introduced over the summer by Senators Lee, Murphy and Sanders would be a good place to start. In addition to common sense changes (such as changing the 60-day withdrawal clock to a 20-day clock that would be more difficult to manipulate), the Act would clearly define "hostilities," effectively narrow the realm for unilateral executive branch war-making to true self-defense, require much more robust reporting of conflicts once underway, and deny funding should the executive branch seek to wage war without Congress's approval.

One overdue step that the executive branch should take in support of this reform effort would be to review the inventory of OLC [Office of Legal Counsel] opinions that relate to unilateral executive branch war-making authorities and revoke those that stand out as extreme. The two above-referenced opinions from [September 25,] 2001 and [October 23,] 2002 would be a good place to start.